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REPORTS OF CASES DECIDED

54

IN THE

CIRCUIT AND DISTRICT COURTS

OF THE

UNITED STATES.

CHIEFLY IN THE YEARS 1878 AND 1879.

VOL. III.

WITH AN APPENDIX.

BY ROBERT W. HUGHES,

ONE OF THE DISTRICT JUDGES.

---

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JUDGES OF THE FOURTH CIRCUIT.

Justice of the Supreme Court.

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CHIEF JUSTICE M. R. WAITE, . . . . .	WASHINGTON CITY, . .	January 21st, 1874.

Circuit Judge.

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HUGH L. BOND, . . . . .	BALTIMORE, MD., . . .	July 13th, 1870.

District Judges.

DISTRICT.	POST-OFFICE.	APPOINTED.
MARYLAND, THOMAS J. MORRIS, . . . . .	BALTIMORE, MD., . . .	July 1st, 1879.
WEST VIRGINIA, JOHN J. JACKSON, JR., . . .	PARKERSBURG, W. VA.,	August 3d, 1861.
WESTERN DISTRICT OF		
VIRGINIA, ALEXANDER RIVES, . . . . .	CHARLOTTESVILLE, VA.,	February 6th, 1871.
EASTERN DISTRICT OF		
VIRGINIA, ROBERT W. HUGHES, . . . . .	NORFOLK, VA., . . .	January 14th, 1874.
EASTERN DISTRICT OF		
NORTH CAROLINA, GEORGE W. BROOKS, . .	ELIZABETH CITY, N.C.,	January 22d, 1866.
WESTERN DISTRICT OF		
NORTH CAROLINA, ROBERT P. DICK, . . .	GREENSBORO', N. C., .	June 7th, 1872.
SOUTH CAROLINA, GEORGE S. BRYAN, . . . .	CHARLESTON, S.C., . .	May 12th, 1866.



## P R E F A C E.

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THE absence of decisions by Chief Justice Waite from this volume is due to the fact that his last two vacations have been given chiefly to the work of the Second Circuit in the city of New York, where the appointment of Judge Blatchford to the Circuit Court, and the illness of Mr. Justice Hunt, had caused an accumulation of business, which could only be dispatched by some other justice of the Supreme Court. Decisions of the Chief Justice in Circuit Court during the last two years are to be looked for, therefore, in the late volumes of Blatchford's Reports.

The great importance of the question discussed in the Arlington Case, as reported in this volume, must be the excuse for inserting at such length the learned brief of the counsel who appeared for the United States in the case.

In the important case of The Atlantic, Mississippi and Ohio Railroad Company, the Bill, the Decree appointing Receivers, and the Decree for a Sale of the road, were thought to be of extraordinary value as precedents in Equity, and are for that reason inserted in full.

The important decision of Judge Rives in the Reynolds Case is reported, in connection with a complete record of the evidence; so also is the charge of Judge Rives in the matter of the county judges given.

In the Appendix is an exhaustive and valuable history of the jurisdiction of the class of Federal Courts known as District Courts with Circuit Court powers.

There also appears in the Appendix a learned letter from a distinguished Western jurist, presenting views in regard to the Arlington Case which were not suggested at the trial of the cause.

NORFOLK, VA., December, 1879.

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### OMISSION.

ON page 354, under the head of *The Stewart Petition*, the following Syllabus was erroneously omitted :

An agreement that so-called preferred stock of a railroad company shall be a lien of a certain dignity, if brought to the knowledge of subsequent incumbrancers, or their agents, creates a valid equitable lien as against them, on the principle that equity considers that as done which ought to be done.

Where mortgage bonds of a railroad company past due were funded by the company into registered certificates bearing a higher rate of interest and giving additional time for the payment of the bonds, and there was no agreement, express or implied, between the company and the bondholders that the acceptance of the certificates should operate as a waiver of the lien of the bonds,

*Held*, Not to be a waiver of such lien, and not to operate as a novation.

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UNITED STATES CIRCUIT AND DISTRICT  
COURTS,

FOR THE FOURTH CIRCUIT.

---

*United States Circuit Court, Eastern District of Virginia, at  
Richmond, May 14th, 1879.*

EX PARTE EDMUND KINNEY.

There are two classes of privileges attaching to an American citizen, to wit:

(1) those which he has as a citizen of the United States; and (2) those which he has as a citizen of the State where he resides as a member of society.

The Fourteenth Amendment of the United States Constitution forbids the States from abridging the privileges belonging to a person as a citizen of the United States; but does not forbid the States from abridging the privileges belonging to their citizens as citizens of States.

Marriage is a privilege belonging to persons as members of society, and as citizens of the States in which they reside, and may be abridged at the will of the States in which they reside.

Marriage, though a contract, is more than a civil contract, and is not affected by the clause of the 10th section of 1st article of the Constitution forbidding a State from passing any laws impairing the obligation of contracts.

A prisoner who has been prosecuted and imprisoned by his State for violating a law of his State relating to marriage, cannot be released by a United States court on *habeas corpus*, on the ground that such law violates the Constitution or a law of the United States.

Section 1977 of the United States Revised Statutes, giving to all persons the same right of making and enforcing contracts as is enjoyed by white persons, only extends to lawful contracts, and does not extend to a marriage declared void by the law of the State of the parties to the marriage; and this, whether the ceremony of marriage was performed in that State or in another State, where such marriage was legal, if the parties to it go out of the State of their residence in order to evade her laws, and return to live and cohabit in the State in positive violation of her express law.

Statement of the case.

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ON petition praying that the writ of *habeas corpus* be addressed to Samuel A. Swann, superintendent of the penitentiary of Virginia, in whose custody the petitioner is detained.

This petition was addressed to the judges of the United States Circuit Court for the Eastern District of Virginia, and was heard at Richmond on the 13th May before Judge Hughes, who rendered his decision on the following day, denying the prayer of the petition and dismissing it.

*L. L. Lewis, United States Attorney, appeared for the petitioner.*

*James G. Field, Attorney-General of Virginia, appeared for the Commonwealth of Virginia.*

Kinney's petition alleges that for five years he has been a resident of the county of Hanover in this State; that he is of the negro race; that he is confined in the Virginia penitentiary in violation of the Constitution and laws of the United States; and prays for discharge from such confinement. The petition states that in October last petitioner and Mary S. Hall, a white woman, visited Washington in the District of Columbia, and were there legally married; that they soon thereafter returned to Hanover County, and there lived together as man and wife; that they were subsequently arrested, tried and convicted by a State court for feloniously leaving the State of Virginia for the purpose of marrying, and for having married in the District of Columbia, and for having returned to this State and cohabited; that upon such conviction they were each sentenced to serve a term of five years at hard labor in the penitentiary, where they are now confined. Petitioner claims that a marriage lawful in the District of Columbia is lawful everywhere in the United States, enabling those so married to live together as man and wife in any part of the United States, and that any State law forbidding them to do so is contrary to the Constitution and void.

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Opinion of the court.

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The following is the decision of the court :

HUGHES, J.—The question presented by this petition involves so seriously the relations of the Federal courts to the laws of the States and their administration by State tribunals, that I shall be excused for giving a carefully considered and painstaking explanation of the ground of my action in this matter. Leaving out of the text such words and clauses as have no application to the case, the following are the provisions of law relating to the jurisdiction of this court on the question of awarding a writ of *habeas corpus* on this petition :

Section 753 of the Revised Statutes of the United States provides that the writ of *habeas corpus* shall, in no case, extend to a prisoner in jail, unless (among other instances, of which this is not one) “where he is in custody in violation of the Constitution or a law of the United States.” Section 754 requires that the application for the writ shall be in writing, setting out the facts concerning the petitioner’s detention, verified by affidavit ; and section 755 authorizes the writ to issue, “unless it appears from the petition itself that the applicant is not entitled thereto.”

The writ, therefore, is not issued as a matter of course. Whether it shall go out or not depends upon the facts presented by the petition, showing whether or not the petitioner’s detention in jail is in violation of the Constitution or a law of the United States. If it appears from the petition itself that the Constitution or a law of the United States has not been violated in the petitioner’s arrest and imprisonment, then, of course, the writ must not go out. It is essential, therefore, to inquire whether, in the facts stated by the petition, the Constitution or any law of the United States has been violated ; and first, I will consider whether there has been a violation of the Constitution.

It must not be forgotten that the Federal courts are forbidden to issue the writ of *habeas corpus* in favor of a prisoner in jail under conviction of a State court, unless the petition itself makes a case for jurisdiction under section 753. I am to inquire whether the averments in this petition release me from that inhibition. I can imagine no subject on which the Federal courts ought to be more considerate in assuming jurisdiction.

The petitioner here is a negro man ; but the question of issu-

Opinion of the court.

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ing the writ does not turn upon any provision of the Constitution relating particularly to race or color. It is only the Fifteenth Amendment which makes special mention of that subject, in providing that the right of a citizen of the United States to vote shall not be denied or abridged on account of race or color. No other provision relates particularly to the distinction of race or color. And as no question of voting is raised in this case, we have no concern with the Fifteenth Amendment. The question here is one of marrying, and there is nothing in the National Constitution expressly forbidding a State from abridging the right of marrying, or indeed any right but that of voting, on account of race or color. The Fifteenth Amendment embodies the implication that a State may abridge any privileges of its citizens other than that of voting. No provision of the Constitution relating particularly to the colored man as such has been violated by the State of Virginia in the prosecution, conviction, and imprisonment of this petitioner.

If any constitutional provision has been violated at all, it is only some general provision relating to the rights and privileges of citizens at large. Is it contended that the 1st section of the Fourteenth Amendment has been violated? That section declares that "all persons born in the United States are citizens of the United States and of the State wherein they reside," and provides that "no State shall make or enforce any law which shall abridge the privileges of citizens of the United States, nor deny to any person within its jurisdiction the equal protection of the laws." This section, after declaring that all persons born in the United States shall be citizens (1) of the United States and (2) of the State wherein they reside, goes on in the same sentence to provide that no State shall abridge the privileges of citizens of the United States; but does not go on to forbid a State from abridging the privileges of its own citizens. Leaving the matter of abridging the privileges of its own citizens to the discretion of each State, the section proceeds, in regard to the latter, only to provide that no State "shall deny to any person within its jurisdiction the equal protection of the laws."

Thus it is seen that the Fourteenth Amendment itself classifies the privileges of citizens into those which they have as "citizens

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of the United States," and those which they have as "citizens of the State wherein they reside;" and this classification has been abundantly recognized, illustrated, and enforced by the Supreme Court of the United States in numerous decisions. See *Trustees of Dartmouth College v. Woodward*, 4 Wheaton, 629; *Gibbons v. Oden*, 9 Wheaton, 203; *New York City v. Miln*, 11 Peters, 133; *Scott v. Sandford*, 19 Howard, 404-6 and 580; *License Tax Cases*, 5 Wall. 471; *Paul v. Virginia*, 8 Wall. 180; *United States v. Witt*, 9 Wall. 41; *The Slaughter House Cases*, 16 Wall. 36; *United States v. Reese et al.*, 2 Otto, 214; and *United States v. Cruikshank et al.*, 2 Otto, 542. See also *Corfield v. Coryell*, 4 Wash. C. C. 371; *United States v. Petersburg Judges of Election*, 1 Hughes, 505; and *The Federalist*, No. 45.

The rights which a person has as a citizen of a State are those which pertain to him as a member of society, and which would belong to him if his State were not a member of the American Union. Over these the States have the usual powers belonging to government; and these powers "extend to all objects, which, in the ordinary course of affairs, concern the lives, liberties (privileges), and properties of the people; and of the internal order, improvement, and prosperity of the State." *Federalist*, No. 45. "The framers of the Constitution did not intend to restrain the States in the regulation of their civil institutions, adopted for internal government, and the instrument they have given us is not to be so construed;" Chief Justice Marshall, speaking specially of marriage, in the *Dartmouth College Case*, 4 Wheaton, 629. Their powers extend, of course, to the control of the domestic relations of all classes of citizens of a State.

On the other hand, the rights which a person has as a citizen of the United States are such as he has by virtue of his State being a member of the American Union under the provisions of our National Constitution. For instance, a man is a citizen of a State by virtue of his being native and resident there; but if he emigrates into another State he becomes at once a citizen there by operation of the provision of the Constitution of the United States making him a citizen there; and he needs no special naturalization, which but for the Constitution he would

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need to become such a citizen. Again, if a citizen of Virginia is allowed by her laws to carry on a business by paying a certain tax, a citizen of Maryland who comes into Virginia and pays the tax is entitled under the National Constitution to carry on the same business in Virginia. The Virginian carries on the business here by right of his State citizenship; the Marylander carries it on here by right of his national citizenship. In the *Slaughter House Cases* the Supreme Court of the United States had under review an act of the Legislature of Louisiana incorporating a company and conferring upon it the exclusive privilege of slaughtering animals within a defined area adjoining the city of New Orleans. Certain butchers of the vicinity, who were thus deprived of the privilege of exercising their trade in that area, assailed the charter as contrary to the provision of the Fourteenth Amendment of the National Constitution quoted above. But the Supreme Court held that the privilege of butchering animals was of the class belonging to persons as citizens of their State, and not belonging to them as citizens of the United States. It therefore held that the legislative act abridging this right of the New Orleans butchers, and confining it exclusively to a favored corporation, did not violate the Fourteenth Amendment or any law passed under it, and could not be the subject of relief by a Federal court, however unjust the State law.

In the light of this commentary, can it be intelligently contended that the laws of Virginia relating to marriage are obnoxious to the Fourteenth Amendment?

These laws are as follows:

The 9th section of chapter 104 of the Code of Virginia provides that "no man shall marry his mother, grandmother, step-mother, sister, daughter, granddaughter, half-sister, aunt, son's widow, wife's daughter or her grandmother or step-mother, brother's daughter's or sister's daughter." The 10th section of the same chapter provides that no woman shall marry within degrees correlative with those defined in the 9th section. Among still other inhibitions of marriage, the same Code, in the 1st section of chapter 105, provides that "all marriages between a white person and a negro, and all marriages which are prohibited by law on account of either of the parties having a former wife or

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husband then living, shall be absolutely void, without any decree of divorce or other legal process."

The penal provisions are as follows: "If any person marry in violation of the 9th or 10th section of chapter 104 of the Code, he shall be confined in jail not more than six months, or fined not exceeding \$500, at the discretion of the jury. Any white person who shall intermarry with a negro, or any negro who shall intermarry with a white person, shall be confined in the penitentiary not less than two nor more than five years." Criminal Revisal of 1878, chapter 8, sections 3 and 8.

It is clear that I am bound by the authorities which have been cited to treat the privilege of marriage as belonging to the class which a person has as a member of society, and not to the class which he has by virtue of the State in which he resides, being a member of the American Union. If Virginia were in the mid-ocean or on the antipodal continent, her control over the rights and privileges of her citizens as members of society, including marriage, would be, no more certainly than now, unrestrained by any provision of the National Constitution. The right to enact as law any one of the three prohibitions of marriage which have been quoted from the Code, as between her own citizens residing within her own territory, is as clear as the right to make the other two. With the propriety, policy, or justice, of such laws a court of the United States has nothing to do. As individual citizens, their judges might possibly question the policy of such a State law, but as judicial officers they can only inquire what is the law. The Fourteenth Amendment gives no power to Congress to interfere with the right of a State to regulate the domestic relations of its own citizens, and if a State enact such laws as those which have been quoted, the Federal courts must respect them as they stand, without inquiring into the reasons of them. However harsh a State law may be, they can only say, with Ulpian, "*Hoc quidem perquam durum est, sed ita lex scripta est.*"

The clause of the Fourteenth Amendment under review makes a further distinction. After declaring that no State shall make any law which shall abridge the privileges of citizens of the United States, it adds: "Nor deny to any person within its jurisdiction the equal protection of the laws." Here is a

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distinction between citizens of the United States and "any persons," whether citizen or alien, residing or happening to be within the borders of a State. The declaratory clause forbids any abridgment of the rights of citizens of the United States. The remedial clause gives equal protection to all persons whatever while within a State's borders. The amendment does not provide that the privileges shall be equal, but it does provide that protection shall be equal. It establishes equality between all persons in their right to protection, but does not confer equality in the privileges they are to enjoy. It provides that whatever privileges the Constitution and laws of the United States confer upon a citizen as a citizen of the United States shall be enjoyed without abridgment; and it provides that all persons within a State, whether a citizen of the United States, or of the States, or aliens, shall be equally protected by the laws in whatever privileges, whether equal or not equal, they may have from the United States or from the State. However unequal their privileges respectively, yet a foreigner, a citizen of another American State, and a citizen of the State, shall have the benefit equally in the State of all remedial laws for the recovery of rights, and of all legal safeguards ordained for the protection of life, liberty, and property.

I think it plain from this review that an equality of privileges is not enforced by the Constitution upon a State in respect to its domestic laws, for the government of its own citizens as such, while they are within its jurisdiction. But even if it did require an equality of privileges, I do not see any discrimination against either race in a provision of law forbidding any white or colored person from marrying another of the opposite color of skin. If it forbids a colored person from marrying a white, it equally forbids a white person from marrying a colored. In its terms, and, for all I know, in its spirit, the law is a prohibition put upon both races alike and equally. In the present case, the white party to the marriage is in imprisonment as well as the colored person.

I think it clear, therefore, that no provision of the Fourteenth Amendment has been violated by the State of Virginia in its prosecution of this petitioner. It would seem to follow from this conclusion that no act of Congress passed to enforce that amend-

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ment is violated ; and I know of none that can be claimed to have been, unless it be the first section of the Civil Rights Act of 1866, now section 1977 of the Revised Statutes, which provides that "all persons within the jurisdiction of the United States shall have the same right in every State to make and enforce contracts as is enjoyed by white citizens, and shall be subject to like punishments," etc. As to punishments, I have just shown that the penalty of the State law is denounced equally and alike upon the white and colored persons who contract the illegal marriage with each other. As to rights, this is a law for the enforcement of that clause of the Fourteenth Amendment which requires a State to give the equal protection of the laws to all persons within its borders. All are permitted to make and enforce contracts ; not, indeed, any sort of contracts which they may see fit to make, *e. g.*, polygamous or incestuous contracts of marriage, or usurious contracts for money ; but such contracts as are lawful. It is for a State and for Congress, each within its respective sphere of constitutional authority, to say what shall be lawful contracts, and it is only such as are legal that can be made, and enforced within the State by "all persons within the jurisdiction of the United States." Provided the State law does not abridge a right which a person has in his character of a citizen of the United States, of which marriage, as we have seen, is not one, the State may declare at will what contracts are and what are not legal within its jurisdiction, and section 1977 confers the right of enforcing only such contracts as are legal.

Congress has made no law relating to marriage. It has not, simply because it has no constitutional power to make laws affecting the domestic relations and regulating the social intercourse of the citizens of a State. If it were to make such a law for the States, that law would be unconstitutional, and the Federal courts would not hesitate to declare it so. It is the State which is endowed with the sovereign power of making such laws, and therefore only those contracts of marriage that are legal under State laws can be enforced or enjoyed within the jurisdiction of the State.

All this has been said on the hypothesis that the contract of marriage is subject, like pecuniary contracts, to the operation of

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section 1977. But marriage is more than a contract. It may be entered into at the will of competent parties, but it cannot, as other contracts may, be released at their will. Nor can its terms be shaped at their will ; it cannot be for so many years and then cease, for it must be “until death us do part ;” it cannot be entered into with one or more of the opposite sex at pleasure, but must be with one only, for the joint lives ; it cannot be confined in effect to a single territorial jurisdiction, but has the same effect all over the world, so far as permitted by the law of each State or nation. It is plain, therefore, that marriage is not, in many of its qualities, of the class of contracts contemplated by section 1977 of the Revised Statutes ; and in the *Dartmouth College Case*, 4 Wheaton, 629, it was held by the Supreme Court of the United States that the clause of article 1, section 10, of the National Constitution, forbidding a State from passing any law impairing “the obligation of contracts,” does not embrace marriage, it never having been intended to forbid a State legislature to pass an act of divorce or an act conferring power upon State courts to grant decrees of divorce ; the Supreme Court being of opinion that the contracts contemplated by the clause were only such as relate to property or pecuniary values. 1 Minor’s Inst. 275. Thus we see, from another point of view, that marriage is not one of the “privileges” in regard to which the National Constitution and Congress can restrict the power of the States.

It is clear, on the whole, that section 1977 is not violated by the marriage laws of Virginia, and I know of no other act of Congress that has been, considering the petitioner and his consort as citizens of Virginia, and treating their case as if the marriage had been entered into in this State.

But this marriage was not entered into here. The parties to it went to the District of Columbia for the purpose of contracting it ; did there contract it, and returned to reside and cohabit together in this State. Yet this is not the case of citizens of another State, lawfully married in that domicile, afterward migrating thence in good faith into this State. If this petitioner had been a born citizen of the District of Columbia, and had there married a white woman in conformity to the laws of that

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jurisdiction, and had afterward migrated with his lawful wife to Virginia, and had been, after becoming thus domiciled here, prosecuted under that provision of the law of Virginia which has been quoted, and convicted and imprisoned, and had filed his petition here, praying for an inquiry into the cause of his detention in prison, the cause presented would have been essentially different from that actually under consideration. Then the question would have been whether such citizens of another State could claim here the protection of the 2d section of the 4th article of the National Constitution. This section declares that "the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States." At first blush it would seem that this provision would give a citizen of the District of Columbia, lawfully married as a citizen there, and afterward domiciliating here, the right to reside here under that marriage. But even in such a case the Supreme Court has decided otherwise. That such a citizen would have a right of transit with his wife through Virginia, and of temporary stoppage, and of carrying on any business here not requiring residence, may be conceded, because those are privileges following a citizen of the United States, as given by the section of the Constitution just quoted, and by the clause of the Fourteenth Amendment previously considered. But it is equally true that such a citizen could not, by becoming a citizen of Virginia, bring here the privilege of exercising as such, a right legally enjoyed in the District, but not given here. In the case of *Paul v. Virginia*, 8 Wallace, 180, the Supreme Court of the United States held that "special privileges enjoyed by citizens in their own States are not secured to them in other States" by the provision of the 4th article of the Constitution which has been quoted. Reviewing its decision in *Bank of Augusta v. Earle*, 13 Peters, 586, the court said that it was never intended by this provision to give to citizens from another State higher and greater privileges in any State than are enjoyed by citizens of that State; that it "was not intended by the provision to give to laws of one State any operation in other States; that they can have no such operation except by the permission, express or implied, of those States; and that the special privileges which they confer must be enjoyed at home, unless the

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assent of other States to their enjoyment therein be given" (pp. 180, 181 of Wallace). The provision of the Constitution in question refers to the privileges given in the State into which the citizen goes, and not to those given in the State from which he comes. And so, even if this petitioner had been a citizen of another State, lawfully married there, and had come here bringing his wife, intending to live here in a condition of matrimony forbidden by our laws, he could not claim the protection of the National Constitution, or of any law of Congress in thus violating our laws.

But the case of the petitioner is weaker than that just supposed. He and his consort were citizens of Virginia. They went abroad to be married in evasion of her laws, and they returned to cohabit together here in violation of them. The marriage certificate gives Virginia as the petitioner's residence, and his going to the District of Columbia was plainly an act in *fraudem legis domesticæ*. The question whether a marriage illegal at home, and contracted in another place, to which the parties had gone in intentional evasion of the domestic law, should be treated as valid by the home State on their resuming residence within it has been much discussed by learned jurisconsults, such as Burge, Huber, Savigne, Pothier, Lord Mansfield, Lord Campbell, Lord Cranworth, Story, Kent, Wharton, and others, whose opinions have been divided. But the question thus discussed has supposed the non-existence of punitive law in the home State. It has been on the question whether the courts of the home State should, in the absence of statutory law, treat the marriage as valid in comity to the State where it was contracted; all writers conceding to the home State the power of adopting punitive laws forbidding the privilege of cohabitation at will. For I think I do not go too far when I assert it as a principle now well settled, that a "State may follow its citizens abroad and attach to acts done there the same consequences as if done at home; and that though the law of the place of a marriage may determine its forms and regularity, yet the law of the domicile of the parties must decide whether the contract was one which might be lawfully made;" and this unquestionably is the rule in regard to marriages polygamous, incestuous, and contrary to public policy. Our own Court of

Appeals has so decided in *Kinney v. Commonwealth*, 2 Virginia Law Journal, 632, following the English House of Lords in the case of *Brook v. Brook*, 9 House of Lords Cases, 193. So also have the Supreme Courts of North Carolina, South Carolina, and Louisiana, in *Williams v. Oates*, 5 Iredell, 538; *State v. Kenney*, 76 North Carolina, 351; *State v. Ross*, 77 Ibid., and Central Law Journal for April, 1877, and *Duprè v. Bonead*, 10 La. An. 411.

But the Supreme Court of Massachusetts, in *Medway v. Needham*, 16 Mass. 157, and that of Kentucky, in *Stevenson v. Gray*, 17 B. Monroe, 192, have decided contrariwise.

The question can no longer be treated as open, however, in Virginia, whose Legislature has recently, in the Criminal Revisal of March 14th, 1878, chapter 7, section 3, declared that

“If any person, resident in this State and within the degrees of relationship mentioned in the 9th and 10th sections of chapter 104 of the Code, or any white person and negro shall go out of the State for the purpose of being married, and with the intention of returning, and be married out of it, and afterward return to and reside in it, cohabiting as man and wife, they shall be as guilty, and be punished, as if the marriage had been in this State.”

Now there are many illegal marriages other than those named in the foregoing penal section, of which, though illegal here, Virginia takes no notice if contracted without her jurisdiction. The ordinary “runaway matches” so frequent in this country, and those known as Gretna Green marriages in England, are not placed in either country under the ban of annulling or penal statutes, but, on the principle of interstate comity, are allowed to stand good. It is only marriages which are polygamous, incestuous, or contrary to public policy which are made the subject of penal exactments, such as that of the 3d section of chapter 7 of our Criminal Revision just given.

This petitioner is here, not as a citizen of the District of Columbia, to which he went to be married in evasion of the laws of Virginia, but as a citizen of Virginia amenable to her laws. He is here in that character only, and has brought back no other right in regard to the marriage which he made abroad than he

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took away. He cannot bring the marriage privileges of a citizen of the District of Columbia any more than he could those of a citizen of Utah, into Virginia, in violation of her laws. It was competent for the State of Virginia, so far as there is anything in the Constitution and laws of the United States to prevent, to enact the law just quoted under which the petitioner was convicted, and, therefore, his case is beyond relief from a Federal court.

I know it is claimed that the provision of the 4th article of the National Constitution, which requires each State to "give full faith and credit to the public acts, records, and judicial proceedings of the other States," has an important bearing on the present case. I have already abundantly shown that it cannot have the effect of making the laws of one State the laws of another. It is doubtful whether the marriage certificate of a clergyman or magistrate is a "public" record in the meaning of this provision of the Constitution. But whether it be or not, the clause in question could only go to the extent of rendering indisputable the fact of the marriage and of its legality in the place of contract. To give to public records "full faith and credit, is to attribute to them positive and absolute verity, so that they cannot be contradicted, or the truth of them be denied any more than in the State where they originated." Story on the Constitution, section 1310. "A court is bound to take judicial notice of the public records of another State." *Owings v. Hull*, 9 Peters, 627. "A judgment in one State is a judgment in another, only so far as to preclude inquiry as to the merits of the subject-matter of the original judgment." *McElmoyle v. Cohen*, 13 Peters, 312. So that a money judgment obtained in the courts of another State is not a judgment here, but only a chose in action, requiring to be specially sued upon in this State. A public record certifying a marriage to have been legally contracted and valid there, though indisputable proof here of those two facts yet does not convert the fact of validity there into validity here, contrary to the express local law. It has never been pretended that the laws of a State can, by the acts of individuals, be subordinated within its own jurisdiction to the laws established by another State. A citizen of Virginia may go to

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the Federal District of Columbia, or to the Federal Territory of Utah, and be married there in conformity to the local laws, and may remain there as a resident and citizen with impunity. But if his object in going was to evade the laws of Virginia, and if, after marriage, he returns here and remains in a condition of matrimony forbidden by our laws, the certificate of his marriage in the District or Territory, in conformity to its laws, will have no other value here than as indisputable proof of his violation of our laws.

On the whole, I am of opinion that the law of Virginia, under which this petitioner is detained in prison by the State, does not violate the Constitution or any law of the United States; and that I have, consequently, no jurisdiction to grant the relief for which the petitioner prays. The writ of *habeas corpus* is denied.

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*United States District Court, Eastern District of Virginia, at  
Richmond, April 19th, 1878.*

EX PARTE A. W. McKEAN, ON PETITION FOR WRIT OF  
HABEAS CORPUS.

Where a citizen charged with an offence committed in another State has been committed for trial by the committing magistrate of a State, it is competent for a court of the United States on a writ of *habeas corpus* to inquire into the validity of the mittimus, and to discharge the prisoner unless,

1. There is a *charge* of crime against the prisoner in the State from which he is alleged to be fugitive;
2. There be a demand by the Governor of that State for his arrest and detention;
3. There be an indictment found in the State from which the prisoner has fled, or an affidavit made and certified by the Governor of that State; and
4. The prisoner should have been in the State where the crime was committed, and have fled from it.

THE petition is in these words:

Your petitioner, A. W. McKean, would respectfully represent to the court that he is a resident of the State of New York; that he is a commercial traveller, representing the house of Kelly & Co., in the town of Rochester; that a few days ago he came

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to the city of Richmond in the interests of his house; that on the 17th day of April, 1878, he was arrested by the police of the city upon suspicion of being a fugitive from justice in that he has been guilty of forgery in the State of Kansas; that this arrest was made upon the bare description of the forger in a detective newspaper; that on the 18th of the month he was carried before the Hon. J. J. White, police justice of said city, and was by him committed to jail to await the action of the Hustings Court.

The petitioner would state that he is wholly innocent of any such crime, that he is illegally detained in custody, without just or sufficient cause.

In consideration whereof your petitioner prays that your honor will issue a writ of *habeas corpus* directed, etc.

The writ was issued, and on the hearing the following was the decision of the court:

HUGHES, J.—The Constitution of the United States, article 4, section 2, authorizes the executive of any State from which a person accused of crime has fled to demand of the executive of the State into which he has fled, that he be delivered up and removed to the State having jurisdiction of the crime; and Congress has provided section 5278, R. S., that the arrest for that purpose be when there is produced a copy of an indictment found, or an affidavit made before a magistrate certified to be authentic by the executive of the State where the crime is charged to have been committed.

The State of Virginia has adopted provisions similar to if not identical with those of the Constitution and laws of the United States on this subject, and whether she had done so expressly or not, these latter provisions are a part of her law and are obligatory upon her officers and courts. It has been held that the power of Congress to legislate on this subject of the delivery of fugitives from one State into another is exclusive, and that its law is the paramount law of the subject. *Prigg v. Pennsylvania*, 16 Peters, 539; *Martin's Case*, 2 Paine, 248; *Jones v. Vanzandt*, 2 McLean, 612; *Smith's Case*, 3 McLean, 121.

It was competent for this court to issue the writ in this case,

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because Congress has given jurisdiction to the courts and judges of the United States to issue the writ of *habeas corpus* in cases of prisoners who are in jail, or in custody in violation of the Constitution or any law of the United States. So that the only question before me is whether this prisoner is illegally confined, that is to say, whether he is confined upon a charge and upon proofs illegal or insufficient in contemplation of the law under which he has been apprehended and held.

It would seem plain from the language of the laws of Congress and of Virginia that, in order to justify an arrest and detention in a case like the present one, there must first be a *charge* of crime against the prisoner in the State where the crime is alleged to have been committed; that there must secondly be a demand by the governor of that State upon this for the arrest and detention; thirdly, that the evidence on which the arrest is based must be an indictment found in the State from which the prisoner has fled, or an affidavit made and certified by the governor of that State; and it would seem obvious, fourthly, that the prisoner should have been in the State where the crime was committed, and had fled from it.

The law of Virginia does not strictly conform in language or substance to the law of Congress describing the evidence on which the arrest and detention shall be made.

The law of Congress requires that they shall be made on production of the copy of an indictment found, or on production of an affidavit made before a competent magistrate, "certified as authentic by the executive of the State from whence the prisoner so charged has fled;" while the law of Virginia provides that the arrest may be made "upon complaint on oath or other satisfactory evidence that such person committed the offence." I think the intention of the Legislature of Virginia was to make some such proof as that contemplated by the act of Congress, requisite to the arrest of a person charged with crime in another State, but it does not in terms require that the affidavit or indictment should come certified by the executive of the State where the crime was committed. It seems to me that the law of the State ought to be construed in connection with the law of Congress of which it is a part; and that on *habeas corpus*, it is com-

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Syllabus.

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petent for me to look into the proceedings which took place before the committing magistrate, for the purpose of determining whether the requirements of the law of Congress in respect to the arrest and detention of fugitives from justice from other States have been observed.

If the committing magistrate were merely holding this prisoner from day to day, awaiting such testimony as the law requires, I should remand the prisoner to him and await his final action; because it is customary as an act of comity between States that, in such cases, a reasonable time shall be allowed for sending on the requisite proofs of the crime and of the charges from the State where the crime was committed. But it seems that the magistrate has taken final action in the matter, and exhausted the powers intrusted to him by the State law, so that the prisoner is before me on the validity of the *mittimus*, which is made part of the return of the jailer of Richmond to the writ of *habeas corpus*.

The committing order of the magistrate does not set out in terms such facts as are required by law to give him authority to arrest and detain this prisoner. There is no demand from another State. There is no evidence that a crime has been committed. Nor is there evidence that this prisoner committed such a crime as the magistrate knew of only by hearsay. The prisoner must be discharged.

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*United States Circuit Court for the District of South Carolina,  
April Term, 1879. In Equity.*

WILLIAM L. BRADLY v. THE MARINE AND RIVER PHOS-  
PHATE MINING AND MANUFACTURING COMPANY OF  
SOUTH CAROLINA, GEORGE W. WILLIAMS & CO., PELI-  
PER, ROGERS & CO., ET AL.

1. The president of a corporation may with his own means (the company being embarrassed and without funds to do so) purchase the past due outstanding bond of the company, and hold the same as against the company. Otherwise if he purchase with the funds or credit of the company.

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- 2 A corporation may make a valid contract with its president, renewing, extending, and increasing the rate of interest upon its own past due bond, held by him, the contract being a fair and equitable one.
3. The validity of a receiver's act in selling or exchanging the property in his possession as such receiver will not be questioned in a collateral suit in another court. The court whose officer he is, having approved his accounts, discharged him, and cancelled his bond, must be assumed to have authorized as well as approved the sale.
4. The bond in this suit, though originally given by one citizen of the State of South Carolina to another, after the renewal agreement of May 13th, 1874, became commercial paper, and the same passed from hand to hand by delivery; and having passed into the hands of the plaintiff, a citizen of Massachusetts, he may maintain suit thereon in this court. It does not fall within the prohibition of the 11th section of the Judiciary Act of 1789.

ON the 28th day of December, 1872, the Marine and River Phosphate Mining and Manufacturing Company of South Carolina, one of the defendants, obtained from William J. Gayer, receiver of the bank of the State, a loan of twenty thousand dollars, and, to secure the payment thereof, executed the following bond :

STATE OF SOUTH CAROLINA, }  
CHARLESTON COUNTY. }

Know all men by these presents, that we, the Marine and River Phosphate Mining and Manufacturing Company of South Carolina, are held and firmly bound unto William J. Gayer, receiver, in the sum of twenty thousand dollars, with interest thereon, at the rate of ten per cent. annually, payable semi-annually, to be paid on the first day of July next ensuing the date hereof, for which payment well and truly to be made, we, the said company, do hereby bind ourselves and our successors firmly by these presents.

In witness whereof the said company have caused their seal to be hereto affixed the 28th day of December, A. D. 1872.

We, the said company, do further covenant and agree that the above bond constitutes a lien upon the property of said company, and that the same is issued under and pursuant to the provisions of section *thirty-nine* of chapter sixty-four of the General Statutes.

This bond was not paid at maturity, but lay along without renewal, the company paying the interest, until April 2d, 1874, when C. C. Puffer, receiver (successor to William J. Gayer, receiver), sold and delivered said bond to one A. J. Coe, who purchased the same at the instance and with the means (\$30,000 of the capital stock of said Marine and River Phosphate Mining

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Statement of the case.

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and Manufacturing Company) of D. T. Corbin, then president of the Marine and River Phosphate Mining and Manufacturing Company of South Carolina. The receiver indorsed said bond as follows :

In consideration of the sum of twenty thousand dollars to me in hand paid, and by order of Judge Graham, I hereby assign this bond to bearer.

Coc delivered said bond to Corbin, president of the defendant company, who informed the company that further time for payment of said bond would be given on condition that the interest be advanced to the rate of twelve per cent. per annum, payable quarterly. The proposition was submitted to the board of directors of the company, who agreed to said proposition, and directed that the following be written upon said bond, which was accordingly done, and the signature of the president and treasurer with the *seal* of the company attached, to wit :

In consideration of further forbearance on the part of the holder of this bond till the first day of January, A. D. 1875, the Marine and River Phosphate Mining and Manufacturing Company of South Carolina hereby promise, waiving all set-off or other defence, to pay this bond to bearer on the first day of January, A. D. 1875, with interest at the rate of twelve per cent. per annum, from the first day of April, A. D. 1874, payable quarterly ; and should said bond not be paid on the first day of January next, then thereafter interest shall be paid in the same manner and at the same rate as herein mentioned till paid.

The other defendants named are sued as stockholders, who are jointly and severally liable under the general incorporation act of South Carolina, under which the defendant company was organized, for the debts of the company contracted before the full amount of the capital stock is paid in. This section 22 of the statute is as follows :

The members of every company shall be jointly and severally liable for all debts and contracts made by the company until the whole amount of capital stock, fixed and limited by the company in manner aforesaid, is paid in, and a certificate thereof made and recorded as prescribed in the following section.

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Opinion of the court.

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Section 36 of said act, relative to the collection of an execution against the company and stockholders, is as follows:

When the stockholders of such a company are liable to pay the debts of such company, or any part thereof, their property may be taken therefor on an order of attachment, or on execution issued against the company for such debt, in the same manner as an order of attachment and execution issued against them for their individual debts.

The additional facts in the case are sufficiently stated in the opinion of the court.

BOND, J.—This cause came on to be heard upon the pleading, and the testimony taken and reported by James E. Hagood, Special Master. The substantial facts in the cause seem to be that the defendant company is a corporation under the laws of the State of South Carolina, was organized under the act entitled “An act to regulate the formation of corporations,” approved December 10th, 1869, which act was subsequently amended by act of March 9th, 1871.

These acts were subsequently embodied in the General Statutes of South Carolina, in chapter 64, commencing on page 357. The capital stock of this corporation was fixed and limited at five hundred thousand dollars, and the same divided into five thousand shares, of one hundred dollars each. There has been paid in of said capital stock but two hundred and fifty thousand dollars, or fifty dollars per share. It is admitted that at the date of the filing of the bill in this cause, Louis D. Mowry was the owner and holder of seventy-five shares of said capital stock in said company; that F. J. Pelzer, F. S. Rogers, Wesley G. Muckenfuss, and Thomas S. Inglesby, constituting the firm of Pelzer, Rogers & Co., were the owners and holders of one hundred and seventy-six shares of said capital stock in said company, and that George W. Williams, William Birnie, Joseph R. Robertson, James Bridge, Jr., Frank E. Taylor, and Robert S. Cathcart, constituting the firm of George W. Williams & Co., were the owners of one hundred and twenty-eight shares of said capital stock in said company. These persons named were made, with the said company, defendants in this action, have answered, and

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are now before the court. The cause of action in this case grows out of the unpaid portion of a bond, executed by the defendant company on the 28th day of December, 1872, in the sum of twenty thousand dollars, to William J. Gayer, receiver.

This bond, it appears, was given for (\$20,000) money loaned by said Gayer to the said company.

Said bond was payable on the 1st day of July following the date thereof, with interest at the rate of ten per cent. per annum.

In said bond is the following covenant :

We, the said company, do further covenant and agree that the above bond constitutes a lien upon the property of said company, and that the same is issued under and pursuant to the provisions of section 39 of chapter 64 of the General Statutes.

The said bond was duly recorded in the office of the register of mesne conveyances for Charleston County, South Carolina, on the 3d day of January, A. D. 1873. Said bond was not any portion of it paid at maturity by said Marine and River Phosphate Mining and Manufacturing Company of South Carolina, but was allowed to lie along without change or renewal (the said company paying the interest thereon) until some time in March, 1874, when C. C. Puffer, receiver, successor of William J. Gayer, receiver, demanded payment of said bond. At the time of said demand for payment of said bond, said company was in some financial embarrassment, and was not in possession of funds to pay the same. In consequence of this embarrassment, D. T. Corbin, who was then president of the company, induced one A. J. Coe to enter into negotiation with said C. C. Puffer, receiver, with the view to purchase said bond, he, said Corbin, furnishing said Coe, from his own private property, the means (three hundred shares, or \$30,000 of the capital stock of said company) to effect such purchase.

The bond was purchased by Coe from C. C. Puffer, receiver, and the same was delivered to him.

This sale and delivery of said bond was effected about the middle of April, 1874. Soon after its purchase said A. J. Coe assigned and delivered said bond to said D. T. Corbin, in consideration of the thirty thousand dollars of stock advanced by him to said Coe to purchase said bond.

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Opinion of the court.

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After said bond thus came into the possession of D. T. Corbin, he informed the board of directors of said company that the company could have further indulgence in the payment of said bond if they would renew the same, and pay the regular bank rates of interest thereon, twelve per cent. per annum, and pay the same quarterly. Thereupon the board of directors, on the 13th day of May, 1874, directed the following indorsement to be written upon said bond, to wit:

In consideration of further forbearance on the part of the holder of this bond, till the 1st day of January, A. D. 1875, the Marine and River Phosphate Mining and Manufacturing Company of South Carolina hereby promises, waiving all set-off, or other defence, to pay this bond to bearer on the 1st day of January, A. D. 1875, with interest at the rate of twelve per cent. per annum, from the 1st day of April, A. D. 1874, payable quarterly; and should said bond not be paid on the 1st day of January next, then thereafter interest shall be paid in the same manner and at the same rate as herein mentioned, till paid.

The said bond continued in the possession of D. T. Corbin from this time forward till June, 1877, when he sold and delivered the same to the complainant, William L. Bradley, of Boston, Massachusetts.

Up to January 1st, 1877, said D. T. Corbin collected and received the interest as it fell due on said bond under the renewal agreement of May 13th, 1874; and in December, 1876, he collected and received from the company ten thousand dollars in money, on account of the principal due on said bond.

It thus appears that there is due and unpaid upon said bond the sum of ten thousand dollars, with interest thereon at the rate of twelve per cent. per annum, payable quarterly, from the 1st day of January, A. D. 1877. The defence to this action made by the defendant company is, first, that said bond was "paid" by the \$30,000 in stock of said company, which said C. C. Puffer received therefor from A. J. Coe. As to this defence, it is sufficient to say, that there is no evidence that shows that said purchase of said bond by A. J. Coe was intended as a payment thereof. That none of the parties to this transaction—Puffer, Coe, or Corbin—so understood it, but the very reverse; and further, the consideration paid, although it was \$30,000 of the

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Opinion of the court.

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capital stock of said company, was not the property of the company, but the private property of D. T. Corbin.

It is not pretended that the company paid or furnished the means to pay said bond at the time C. C. Puffer parted with the same to A. J. Coe, in April, 1874; and the only basis for the claim of payment is the entry made in the final accounts of C. C. Puffer, receiver, made to the Court of Common Pleas for Charleston County, in which it appears that this bond is accounted for as "paid" by the transfer to him of three hundred shares of stock in the Marine and River Phosphate Mining and Manufacturing Company of South Carolina.

That this entry is not *technically* correct is shown by the admitted fact that the company furnished no means to *pay* the bond then, and neither did Corbin or Coe purchase on behalf of the company.

This entry is explained by Mr. Puffer as his method of recording the transaction, and it meant, so far as the *fund* in his hand as receiver was concerned, that the bond was exchanged for said \$30,000 of stock. But it may be further remarked, that neither Corbin or Coe, as far as appears, was a party to the said entry in Puffer's account as receiver, and that entry, hence, does not conclude them.

There is, therefore, no ground for asserting that said bond was or has been paid by or for the defendant company.

A further defence is made that D. T. Corbin was, at the time of the purchase of said bond from C. C. Puffer, the president of the defendant company, and as such president he was incapacitated to speculate in the paper of the company, and so forth; and all benefit and advantage arising from said purchase of said bond by him inured to the benefit of the company, and so forth.

This defence set up, if sound in principle, which it is not, does not appear to have sufficient basis of fact to rest upon.

It is not alleged in the pleadings or proved by the evidence of the defendants that D. T. Corbin paid less than twenty thousand dollars in value for said bond, and hence there is no ground for saying he speculated in the sense of making profit out of the paper of the company.

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So far as appears, he paid a full price for the bond; and it still further appears that he entered into the transaction to protect the credit of the company, and to save it from embarrassment, because the company was not in funds at the time to pay the bond. If D. T. Corbin, as the president and agent of the company, had purchased said bond with the funds or credit of the company, said transaction would now be held to have been made for the benefit of the company, without doubt, and the company would be entitled to any benefit or advantage, if any, accruing therefrom. But as the transaction was made with his own means, and because the company had no means with which to make it, the bond became his own private property just as much as the private property was his that he exchanged for it.

There was nothing in his position, as president, that forbade the purchase of this bond if he chose to make it.

But it is further said, that the renewal indorsement put upon the said bond by order of the board of directors, on May 13th, 1874, was null and void, *because* said board was not aware at the time that said D. T. Corbin was the holder of said bond, and the same was in fraud of the rights of stockholders.

As to this defence it may be again said it has no sufficient basis of fact to stand on. In the renewal of said bond in the form that it was *done*, the board of directors obtained an indulgence in the postponement of the day of payment from D. T. Corbin precisely as they would have done from anybody else not connected with the company.

*It is not shown that there was any fraud on his part, or that any wrong was done by him to the company or stockholders.*

So far as said indorsement is concerned, it was evidently more to the advantage of the company than it was to Corbin. What did they receive by it?

Six months and a half delay in the payment of their bond, which was then nearly two years past due. What did they give for that indulgence?

They increased the rate of interest on said bond two per cent.,—that is, promised to pay the then current bank rate of interest. They simply agreed to pay Corbin for his money what

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they would have been compelled to pay anybody else, or just what anybody else would have paid him.

It is impossible to maintain that such a transaction was a *fraud upon the company or its stockholders*. As to the facts alleged that the directors of the company did not know at the time they made the indorsement of May 13th, 1874, upon the bond, that D. T. Corbin, their president, actually owned and held the bond, it is disputed.

Mr. Reuben Tomlinson, then treasurer of the company; says they did know it. That he knew all about it, and so did most if not all the directors; that he conversed with them about it, and that it was regarded as extremely fortunate for the company that the bond had fallen into friendly hands, and so forth.

It seems to me quite immaterial how the fact is, and quite as favorable to the plaintiff if the directors did not know that Corbin held the bond as it would be if they did know it. If they did not know it then it must be assumed that they were not influenced by the fact in taking the action that they did, that they acted impartially and as if dealing with a stranger—just as they should have acted.

As to the validity of the new contract of May 13th, 1874, renewing and extending said bond, there is no ground for questioning it. It was a *bona fide* transaction, made by the board of directors of the company with D. T. Corbin, then a director and president, by which the company got further time for payment upon their valid outstanding past due bond. The bond being past due, Corbin was entitled to have the same paid at once. The extension of the bond, therefore, by him may be regarded as a loan to the company.

That any officer of a corporation may make a valid loan to it there is no doubt. Something has been said about a want of authority in C. C. Puffer, receiver, to sell and transfer said bond. This authority, if he had any, was derived from the Court of Common Pleas for Charleston County, whose officer he was. If there was no authority to make the sale, then that court should deal with the receiver and his bondsmen. But it appears that the sale and transfer of said bond has been approved by the

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Opinion of the court.

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Court of Common Pleas for Charleston County, and Mr. Puffer, as receiver, and his bond, have been discharged. This court must, therefore, assume under the circumstances that Receiver Puffer had ample authority to make the sale and transfer of said bond. His authority cannot now be questioned in this collateral action in this court. The plea to the jurisdiction interposed in this cause by special permission *after the defendants had answered*, and the case was at issue, is overruled. By the terms of the indorsement of May 13th, 1874, put upon the bond by the defendant company, the said bond became commercial paper, and the same passed from hand to hand by delivery. It does not, therefore, fall within the prohibition of the 11th section of the Judiciary Act of 1789.

The authorities upon this point are ample, and it is unnecessary to discuss them.

The result is, that the plaintiff is entitled to a decree against the defendant company in the sum of ten thousand dollars, with interest thereon at the rate of twelve per cent. per annum, payable quarterly, from January 1st, 1877, to the present time. The defendants named as stockholders are, by the charter of the company, jointly and severally liable for the said sum, and the execution decreed against the company may, by the terms of the charter, be levied upon their property or the property of either of them. The plaintiff is also entitled to have the lien of the bond upon the property of the company foreclosed, and the property sold to pay and satisfy the sum now found to be due.

A decree will be entered in accordance with this opinion.

## THE ARLINGTON CASE.\*

*United States Circuit Court for the Eastern District of Virginia,  
at Alexandria, on the 2d, 4th, 5th, and 15th March, 1879.*

GEORGE W. C. LEE *v.* FREDERICK KAUFMAN, R. P. STRONG,  
ET AL.

As courts of justice may take cognizance of actions affecting the personal property of the government of a sovereign power whenever the service of *mesne* process before adjudication does not involve the seizure of the property out of the hands of its officers, even though the proceeding looks to a judgment, final execution upon which if issued would dispossess the government; so they may take cognizance of actions concerning real property, especially in statutory ejectments, where the forms of law and the practice of the courts admit, under statutory provision, of a trial of the right or title upon a summons, and appearance of the occupant of the land, where he is an officer or agent of the government and his occupancy is not interfered with; and this is especially so when the government voluntarily intervenes to assist such officer or agent in defending its title to the land.

THE plaintiff sued in ejectment for the recovery of the Arlington Estate, near Alexandria. The suit was brought in the Circuit Court of Alexandria, and removed into the Circuit Court of the United States, on petition of the defendants by procurement of the United States.

It was heard upon suggestion made by the attorney-general of the United States, that the property was claimed by the United States on a title of record, and that the United States could not be sued; and upon his motion for the dismissal of the proceeding, and the plaintiff's demurrer to the attorney-general's suggestion.

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\* For a statement of the facts of the case, as drawn by the court, see p. — to —.

For the argument of counsel for the United States, see p. — to —.

For the opinion of the court on the question of jurisdiction, see p. — to —.

For the opinion of the court, at the trial on the merits, see p. — to —.

For a note of the judge on the case of *Carr v. The United States*, see p. — to —.

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Statement of the case.

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The cause was argued at Alexandria on the 2d, 4th, and 5th of March, 1878. W. J. Robertson, Legh R. Page, and Francis L. Smith for the plaintiff; and the district attorney, L. L. Lewis, and W. Willoughby for the United States; the solicitor-general of the United States, Samuel F. Phillips, attending in person.

The decision of the court was rendered at Richmond on the 15th of March.

The case was heard first upon the question of jurisdiction, and afterwards upon the merits by Judge Hughes.

The facts bearing upon the question of jurisdiction were stated by Judge Hughes, in his opinion on that branch of the case, as follows :

THE FACTS OF THE CASE AS TO JURISDICTION.

As necessary to an intelligent understanding of what is to be decided, I must set out the facts of the case as shown by the record. I will connect with them some others derived *aliunde* chiefly from the briefs of counsel, which are inseparable from those exhibited in the pleadings, but to which I shall allow no technical value, and which will be seen not at all to influence the judgment of the court. I conceive the facts of the case to be as follows :

The late G. W. Parke Custis was the owner in fee of the tract of eleven hundred acres of land which is the subject of this controversy. It is known as the Arlington Estate. It is situated south of the Potomac River, in Alexandria County, Virginia, and forms a conspicuous object in the landscape which presents itself to the eye in looking southward from the Capitol at Washington. I need not add that it is an estate of considerable value, and of profound historical interest.

Mr. Custis, who died in 1857, devised this estate to his only child, Mrs. Mary A. R. Lee (wife of General Robert E. Lee), to be held during the term of her natural life, and at her death to the present plaintiff, G. W. Custis Lee, to be held in fee.

During the civil war this estate, with the Arlington mansion, was unoccupied by its owner, Mrs. Lee, who was then living;

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and the title did not pass to her son until 1873, the date of her death.

On the 5th of August, 1861, the United States Congress passed "An act to provide increased revenue from imports to pay interest on the public debt, and for other purposes," and on the 7th of June, 1862, passed "An act for the collection of direct taxes in insurrectionary districts within the United States, and for other purposes," and on the 6th of February, 1863, enacted still another law, entitled "An act to amend an act entitled 'An act for the collection of direct taxes in insurrectionary districts within the United States, and for other purposes.'" The first-named law imposed a direct tax of \$20,000,000 upon the United States, and apportioned to Virginia the sum of \$937,552.67. The tax imposed on Arlington was \$92.07.

On the 11th day of January, 1864, the whole estate of eleven hundred acres was sold for the payment of this tax by John W. Hawxhurst, Gillett F. Watson, and A. J. Foster, who were the duly appointed and confirmed direct tax commissioners of the United States for Virginia. The price bid by the government was \$26,800, an amount exceeding the means of any friend of the owner who might have desired to buy in the property for him. It was so bought in by the tax commissioners under authority of that clause of the act of Congress of February 6th, 1863, which empowered the government, at such a sale as this was, to purchase lands which might be selected by the President "for government use, for war, military, naval, revenue, charitable, educational, or police purposes." The United States at once took possession of the estate, and has held it ever since; no part of the purchase-money which would have remained, after deducting the tax, having ever been paid over either to the life tenant or remainderman.

The estate is now occupied by Frederick Kaufman, R. P. Strong, and about two hundred other persons. Against all these by name, as defendants, the plaintiff, in April last, brought two actions of ejectment (now treated as one) in the Circuit Court of Alexandria County, Virginia, having postponed his suit until within the last year of the period of five years, after which it

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Statement of the case.

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would, in some of its objects, have been barred by the statute of limitations. The action was statutory ejectment under chapter 131, Code of Virginia.

The notice in ejectment was served personally on each occupant, and the declaration was filed at the May rules following.

In due course of procedure the defendants all appeared by counsel and demurred and pleaded, their plea being the general issue authorized by the statute. The cause was thus matured for trial at the term of the State court, which was held in July, 1877.

Before the commencement of that term, however, the defendants filed a petition here for the removal of the cause into this court from the State court. The petition was founded upon section 643 of the Revised Statutes of the United States, which authorizes any officer of the United States, or any person holding estate by title derived from any officer of the United States, when sued in a State court by any proceeding affecting the validity of any revenue law of the United States, to remove the cause into a Circuit Court of the United States.

Among the recitals of their petition, the defendants say :

. . . Your petitioners say that they do not claim the title to said land, or interest therein, except as follows, to wit : A certain portion thereof, consisting of about two hundred acres, more or less, is in charge of the War Department of the United States, and is being used as a national cemetery for the burial of deceased soldiers and sailors of the United States ; and the said defendant Kaufman is a superintendent thereof, under the directions of said War Department. The remaining portion of said premises is set apart as a military post, and reserve connected therewith, of the United States, and is now in charge of the defendant Strong, who is an officer of the United States, and occupying the same under orders of the War Department and in obedience to an order thereof, of which the following is a copy, to wit :

WAR DEPARTMENT, ADJUTANT-GENERAL'S OFFICE,  
WASHINGTON, D. C., July 27, 1872.

THE QUARTERMASTER-GENERAL U. S. ARMY.

SIR : The secretary of war directs that all that part of the Arlington Estate outside the walls of the National Cemetery be considered a military reservation pertaining to Fort Whipple, Virginia, and under the immediate charge of the commanding officer of that fort. The secretary has approved your recommendation that those persons who have crops on the proposed sites for the new buildings shall be compensated therefor from the contingencies of the army.

A board of survey has assessed the total amount at \$540, which has been ordered to be paid to the parties ; also that the copy of the survey describing

## Statement of the case.

the metes and bounds of the Arlington Estate be filed in the quartermaster-general's office as record of a military reserve, and be recorded in the proper land record office in Alexandria, Virginia.

(Signed) Very respectfully, your obedient servant,  
E. D. TOWNSEND,  
Adjutant-General.

That such of said defendants, except Strong and Kaufman, as are upon said premises, occupy the same not as tenants, but under permission of the officer in charge of said military reservation, which is in writing or printing, and is substantially as follows:

FORT WHIPPLE, ———, 187 .

This is to certify that ——— permitted to occupy ——— acres of ——— on the Arlington reservation until ———, 187 . No rent will be charged for this occupation of the reservation to that date.

(Signed) ———,  
Officer in charge.

Upon the filing of this petition, a writ of *certiorari* was issued hence to the clerk of the Alexandria Circuit Court, under which a copy of the record in the suit was certified here; the cause, when brought here, being ready for trial on issues joined of law and fact. The following proceedings were thereupon had in this court:

*In the Circuit Court of the United States, for the Eastern District of Virginia.*

G. W. C. LEE	} In Ejectment.
v.	
FREDERICK KAUFMAN, R. P. STRONG, AND OTHERS.	

And now comes the attorney-general of the United States and suggests to the court, and gives it to understand and be informed (appearing only for the purpose of this motion) that the property in controversy in this suit has been for more than ten years, and now is, held, occupied, and possessed by the United States, through its officers and agents, charged in behalf of the government of the United States with the control of the property, and who are in actual possession thereof as public property of the United States for public uses, in the exercise of their sovereign and constitutional powers, as a military station and as a national cemetery, established for the burial of deceased soldiers and sailors, and known and designated as the "Arlington Cemetery," and for the uses and purposes set forth in the certificate of sale, a copy of which, as stated and prepared by the plaintiff, and which is a true copy thereof, is annexed hereto and filed herewith under claim of title, as appears by the said certificate of

## Statement of the case.

sale, and which was executed, delivered, and recorded as therein appears.

Wherefore, without submitting the rights of the government of the United States to the jurisdiction of the court, but respectfully insisting that the court has no jurisdiction on the subject in controversy, he moves that the declaration in said suit be set aside, and all the proceedings be stayed and dismissed, and for such other order as may be proper in the premises.

CHARLES DEVENS,  
Attorney-General.

Then follows the certificate of sale referred to, setting out in full recital the tax title under which the government claims. Upon this suggestion the following rule was issued :

*In the Circuit Court of the United States, for the Eastern District of Virginia.*

GEORGE W. C. LEE	} In Ejectment.
v.	
FREDERICK KAUFMAN, R. P. STRONG, AND OTHERS.	

Suggestion having been made by the attorney-general of the United States that the property in controversy in this cause is in the use and possession of the United States under claim of title of record ; and such suggestion having been filed, together with a motion for those reasons to set aside the declaration and dismiss the proceedings, and for such other orders as may be proper, as more fully appears by such suggestion and motion on file in the office of the clerk of this court at Alexandria,

Ordered, that a rule issue requiring the plaintiff to show cause at the court-house in Alexandria, on the 4th of September, 1877, or as soon thereafter as counsel can be heard, why such motion should not be granted, provided that such rule be served upon the plaintiff or his counsel on or before the 1st of August, 1877.

R. W. HUGHES,  
Judge.

NORFOLK, 19th July, 1877.

In response to this rule the plaintiff filed the following answer and demurrer :

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Statement of the case.

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*In the Circuit Court of the United States for the Eastern District of Virginia.*

GEORGE W. C. LEE  
v.  
FREDERICK KAUFMAN,  
R. P. STRONG, AND OTHERS. }

The plaintiff, not waiving, but still so far as he may lawfully do, insisting upon his motion to remand the cause to the State court, for answer to the summons requiring him to show cause why the motion of the attorney-general of the United States to set aside the declaration and to dismiss the proceedings in the above-entitled cause, for the reasons set forth in the suggestion of the said attorney-general, which has been filed therein, should not be granted, says, and for cause shows :

1st. That said suggestion should be dismissed as not being a proper mode of making an objection to the jurisdiction of the court.

2d. That said suggestion and matters therein contained, in manner and form as they are therein set forth, are not sufficient in law to sustain said motion or to show that any relief whatsoever should be granted under the application made by said attorney-general ; and that the plaintiff should not be required to make any further or other answer thereto.

3d. If this, his demurrer, should be overruled, and he should be required to make further answer to said suggestion, the plaintiff says :

That he does not admit it to be true, as set forth in said suggestion, that the United States are in possession of the property in controversy in this suit by their officers and agents charged on behalf of the government with the control of the property.

One of the defendants, Maria C. Syphax, is in possession of and holds a portion of said property under an act of Congress, approved on the 12th of June, 1866, entitled "An act for the relief of Maria Syphax" (14 United States at Large, chapter 121, p. 589), whereby the title to seventeen acres and fifty-three one-hundredths of an acre, be the same more or less, being a part of the property in controversy in this suit, was released and confirmed unto the said Maria Syphax, being one and the same person.

The plaintiff is informed, and believes it to be true, that a very large majority of the other defendants are in fact tenants of the government of the United States, rendering valuable services in work and labor done and performed by them for said government in consideration of being permitted by it to occupy and use the lands of which they are respectively in possession.

The plaintiff further says that the United States have no other or further title to the property in controversy in this suit than that which was acquired by them as purchasers at a sale thereof for taxes, made by John Hawxhurst, Gillett F. Watson, and A. Lawrence Foster, as United States direct tax commissioners for Virginia, and

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Argument for the United States.

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shown by their certificates of sale, a copy of which is filed with said suggestion ; and the consent of the State of Virginia has never been obtained to such purchase.

The plaintiff, therefore, denies it to be true, as is set forth in said suggestion, that the property in controversy in this suit has been or is now held, occupied, or possessed by the United States, through their officers and agents, charged in behalf of the government of the United States with the control of the property, and who are in the actual possession thereof as public property of the United States, with the control of the property, and who are in actual possession thereof as public property of the United States for public uses in the exercise of their sovereign and constitutional powers, and calls for full proof of each and all of said allegations.

G. W. C. LEE.

Thus the suit is here, not only on the issues of law, made up before the removal from the State court, but on the suggestion of the attorney-general, and the plaintiff's demurrer to the suggestion and answer to the rule *nisi*.

Such are the facts in the case as it stands upon record. It is now heard upon the plaintiff's demurrer to the suggestion, upon the whole record, up to and including the demurrer.

And on that demurrer the first inquiry is : Whether it is competent for the government, in the person of its chief law officers, to appear by suggestion at all ? And the second is, assuming that the suggestion is a proper form of proceeding, Does it set forth such a case in connection with the antecedent record as, conceding the facts alleged to be true, entitles the government to a dismissal of these proceedings, in pursuance of the motion of the attorney-general ?

Counsel on either side submitted elaborate briefs and arguments. It is deemed due to the importance of the question to give that of Messrs. Willoughby and Lewis, counsel of the United States, nearly in full, as the decision was adverse to them.

*Argument of the Counsel for the United States on Motion to Dismiss.*

This action is brought against the parties above named, who are officers of the United States, and nearly two hundred others, who are charged to be in the occupation of the premises in con-

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troversy; and which is the estate known as the Arlington Estate, in the county of Alexandria.

The record shows that there has been what is equivalent to inquisition and office found. The Supreme Court of the United States say, in reference to a sale under this act, in the case of *Bennett v. Hunter*, 9 Wallace, 336, "The sale was the public act, which was the equivalent of office found."

From these facts it appears that the United States is in possession of the property in question; that it is in such possession under claim of title of record, valid upon its face, and that it is being used for proper and necessary governmental purposes. Under these circumstances it has been deemed proper to suggest to the court that it has not jurisdiction to take any action which will tend to disturb this possession of the United States, under those principles which will not allow a suit by a citizen, as plaintiff, against the government, as defendant, or against its property, especially when such property is held and used as this is held and used. For these reasons the motion is made to dismiss this suit.

The inquiry will doubtless be made whether the mode we have selected is a proper one by which to bring this question before the court. The answer to this inquiry will be seen in authorities and precedents which I shall hereafter cite in full, but which I do not, in the order of my argument, wish now to anticipate. For the present it may be sufficient to call attention to the familiar principle, that if the court is apprised by any authentic evidence that it has not jurisdiction of the case before it, it will refuse to proceed until it is satisfied upon that point. In some cases it may be necessary to plead want of jurisdiction. When such plea is made, that question is first to be determined. But when the *subject-matter* of the suit is without the jurisdiction of the court, and this fact comes to the knowledge of the court in any way, it will, either on motion or suggestion, or even *ex mero motu*, at once refuse to proceed. Such is said to be the law in *Heriot v. Davis*, 2 Woodbury & Minot, 229, and cases there cited. In the case of *The Pizarro*, 10 New York Legal Observer, 97, cited in the United States Federal Digest at page 506, suggestion by the United States district attorney was held the proper mode to bring

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to the attention of the court that the suit before it was that of a private suitor against an armed ship of a friendly power, on account of which it could not take jurisdiction.

In *Maxwell's Lessee v. Levy*, 2 Dallas, 381, a rule was issued to show cause why an ejectment case should not be dismissed from the record upon a suggestion that the court had no jurisdiction, for the reason that a conveyance had been made to a non-resident of the State for the sole purpose of giving jurisdiction. The truth of this suggestion was shown upon a bill for discovery, upon which the rule was made absolute.

In the case of *The Exchange*, 7 Cranch, a suggestion was made at the instance of the attorney-general that the property in controversy was a public armed vessel in the service of the French government. Issue was taken to such suggestion and a hearing had, upon which, it having been ascertained that such suggestion was well founded, the case was for that reason dismissed. Upon the record thus made the case was appealed to the Supreme Court, and was by that court heard and decided.

In *Doe on the demise of Legh v. Roe*, 8 Meeson & Welsby, 579, which was an action of ejectment against property held by the Crown, and which I will cite fully hereafter, a rule was made to dismiss, upon suggestion filed by the attorney-general, and which was made absolute.

We are now prepared, I think, to discuss the proposition that the court has not jurisdiction of this case, for the reason that it is a suit by a private citizen against the property of the United States, claimed to be held under a title of record, and used for governmental purposes.

The object of the suit is to establish the right of the plaintiff to the possession of the property in question, and to put him into the actual possession thereof; which can be done only by invalidating this record-title of the government, and putting the government out of possession. Whatever may be regarded as the form or nature of the action, it cannot be denied, nor the fact disguised, that the substantial controversy in this suit is between the plaintiff on the one side and the United States on the other.

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The plaintiff, in accordance with the statute, which requires him to state the nature of his title (Code of Virginia, 1873, p. 959), claims *in fee*. According to the statute (Code, p. 962):

The verdict shall specify the estate found in the plaintiff, whether it be in fee or for life, stating for whose life, or whether it be a term of years, and specifying the duration of such term. The judgment for the plaintiff shall be that he recover the possession of the premises according to the verdict of the jury.

He is thus seeking not merely possession, but a judgment as to the nature of his title, which he claims to be in fee. In both respects his claim is in direct opposition to the interests and claims of the United States; and it cannot be supported except by overthrowing the apparent title of the United States, and evicting them from their present possession; for it is a philosophical axiom that two bodies cannot occupy the same space at the same time.

It is manifest that this suit was intended to be brought in pursuance of the provision of the statute, which says: "The person actually occupying the premises shall be named defendant in the declaration." Code of Virginia, 959. It will, therefore, doubtless be urged that inasmuch as the United States is not named as a party defendant the suit can be maintained, regarding the defendants named as the occupants within the meaning of this statute.

Now, for the purpose of showing that a suit in ejectment is substantially a proceeding *in rem*, a suit against the property rather than as against the parties named, or as against the parties who may happen to be in the occupation of the property at the commencement of the suit, I trust I may be justified in briefly recurring to the nature of this familiar action.

This mode of proceeding was a device of the courts, about two hundred years ago, at Westminster. The plaintiff, who was out of possession, and could not therefore convey the property, made a formal entry upon the land, and executed a lease to a fictitious person, usually called John Doe. This lessee was then supposed to be ousted from his fictitious possession by another fictitious person, sometimes called Richard Roe. Doe, the lessee, then

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commences a suit against Roe, on account of this ouster, and claims the judgment of the court, that he be restored to his possession, from which he has been ousted. The defendant, then, who is called the casual ejector, having no special interest in the matter, sends a notice or warning, to the person who is in the occupation of the land, that these proceedings are going on, that a declaration will be filed at a time named, and advises him to attend to it, as otherwise judgment will be taken by default. On proof of the service of such a notice, if no one appeared, judgment was taken by default and process issued, putting the plaintiff in possession, and, of course, putting the occupant out of possession. Such a suit, as will readily be seen, was not a suit, in form, against the occupant. He was not even named as defendant. As Lord Mansfield said, in *Fairclaim v. Shamtitle*, 3d Burrow's Reports, 1292: "In form it appears as a trick between two to dispossess a third by a sham suit and judgment." The occupant had a mere notice, not a writ or process. He was not made a party to the suit by such notice. If he wished to prevent a process from issuing, which would put him out of possession, he was compelled to apply to the court for leave to show cause why this should not be done. This was granted to him only upon terms, to wit, that he should confess the entry of the plaintiff, his lease, and the ouster, leaving only the question of right of possession to be tried. But if the occupant had no special interest in defending the possession, then any person having title to the property, consistent with his occupation, and interested in preventing the recovery of the plaintiff, was allowed to come in and defend upon the same terms.

This privilege existed at common law, and although a statute was passed giving such right to landlords of the occupant, yet this has been uniformly construed as permitting *any person*, having a title consistent with that of the occupant, to show cause why the plaintiff should not recover possession. 3 Burrow, 1292; Tyler on Ejectment, 447, and cases there cited. But formerly, notwithstanding the introduction of these new parties, the suit was carried on in its original style. This shows that the proceeding was regarded as not an action *in personam*, but *in rem*. The object was, not a judgment against any *person*, but it was *for* the

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possession of the *res*, the thing in controversy. No judgment was rendered against the person. No person was concluded by the judgment. The occupant, or his landlord, even though he had defended the suit, could immediately commence another suit. The only conclusive result of judgment for the plaintiff was to put him into possession. Notice was served upon the occupant, because that appeared to be the best mode of giving notice to all parties interested. The suit could be maintained even when there was no occupant, and it did not abate by the death of the occupant. All these considerations show that the persons named as defendants are of comparatively small importance in the suit, and that such suit is, in substance, a suit against the property itself, rather than against the *nominal defendants*. The *real* defendants are those interested to prevent a change of possession, whether they be the occupants, their landlords, or any other person, having a right to defend the course.

All the text-writers agree that the action of ejectment is a *real* action, in distinction from a *personal* action. "In a real action, the proceedings are *in rem*, for the recovery of real property only." Tidd's Practice, 1. In Runnington on Ejectment, p. 4, the author says :

By the ancient law in ejectment, the plaintiff recovered only damages, the true measure of which was the mesne profits ; the term was not recovered. When, however, it became established that the term should be recovered, then the ejectment had the effect (though by no means the form) of a real action, the proceeding was *in rem*, the thing itself, *the term*, only, was recovered, with nominal damages, but not the mesne profits.

True, ejectment has been styled an action of trespass, founded on tort. This has reference to the ouster, which was one of the fictions that need not be proved. It requires another sort of action for the continued trespass ; to wit, the action for mesne profits.

Now, the statute of Virginia has preserved the essential principles of this action, though it has in some respects simplified the proceedings. This statute is a copy of the New York statute upon this subject.

The revisers in recommending this statute to the legislature of

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New York, say, in their note, they "have carefully adhered to the leading principles of the action, so as to make little or no alteration, except in the form of the proceedings." Instead of having a fictitious defendant, the statute requires that the person occupying the premises shall be named as defendant. It says, also, that the "real claimant shall be named as plaintiff, and all the provisions of law concerning a lessor of the plaintiff shall apply to such plaintiff." Code, 959. Suit is commenced, not by a writ or process, but a declaration is served, and notice that such declaration will be filed. Upon filing the declaration the plaintiff is entitled to a rule to plead. But this rule is a mere entry made in the office of the clerk. It is not required to be served. Judgment for the plaintiff is that he recover possession according to the title he proves. This judgment is conclusive upon the parties who appear and defend the suit as to the right established in the action. It would not be a bar to such persons who do not appear, except, perhaps, as to the person upon whom the notice is served; but it would be conclusive upon all parties until it is set aside by a subsequent action. Parties who do not appear would be put out of possession and their title adjudged to be invalid, and it would be so held until other proceedings or a subsequent ejectment set such judgment aside.

The first effect of judgment for the plaintiff in this case, if the United States do not appear, would be a process to divest them of possession and title, which they could not again obtain except by another suit in ejectment, in which they would be the plaintiffs. By the prosecution of this suit the United States is *compelled* to appear and defend, or to allow their possession to be taken from them, and their title to be adjudged to be invalid, if this suit is proper to be maintained. The judgment operates upon the *property*, irrespective of the parties named in the suit. It thus really affects those who are interested in the title and possession, whether they appear as parties or not. In this respect it is analogous to a proceeding in admiralty against a vessel or against property for the violation of a revenue law, or an attachment against personal property, which may be condemned and sold without reference to the real ownership, or to the owners being named as parties to the cause.

What I claim is, not that this is a direct suit against the United States, but that it is a suit, in substance, against its property, and not, necessarily, against the defendants named, the mere occupants for the time being. They have no right or claim. It is not simply to turn them out that this suit is brought. The real object aimed at is to remove the hands of the United States. It is the title, interest, and possession of the United States which is attacked. In fact I do not believe that a soldier or officer of the United States, who is in charge of property by command of the executive authority, and liable to be removed in a day, is an "occupant" in the sense contemplated by the statute, no more than a mere servant of a tenant would be such occupant, who could not be made a party to such suit. 1 Chitty, 116. The real occupant is the United States. 11 Abbott's Pr. Rep. 97. Let there all along be borne in mind the legal maxim, "*Nemo potest facere per obliquum quod non potest facere per directum.*"

The principle underlying all the authorities relating to the jurisdiction of courts, where their action may affect sovereign power, is that the sovereign power of any nation is supreme; that it is not the subject of judicial power; that it will not permit process against itself either directly or indirectly, or allow its operations or instrumentalities to be affected or disturbed, except by its own consent. Sovereign power is above the courts. It is their creator and master. It cannot permit coercion by judicial process. It cannot allow the supposition that it is capable of doing wrong. The idea contained in the maxim that the king can do no wrong is not peculiar to England. The basis of that maxim is that sovereign power cannot be regarded as capable of wrong, and I will not permit it to be said unchallenged that the dignity and sovereign power of the people of the United States are in any respects inferior to the like attributes of the King of England, or to those of any other sovereign on earth.

Let us now consider some of the authorities relating to the subject before us; and I will begin with quoting from English authors and judicial decisions.

Blackstone, in his Commentaries, vol. 3, p. 236, says:

The common-law methods of obtaining redress or restitution from the Crown, of either real or personal property, are: 1. By petition

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*de droit*, or petition of right. 2. By *monstrans de droit*, manifestation or plea of right ; both of which may be preferred or prosecuted either in the chancery or exchequer.

See also 5 Bacon's Abridgment, title Prerogative, 571. This petition it is well understood, must be presented to the sovereign, who thereupon, by the proper officer, indorses his permission that the right may be tried.

In 4 Coke's Reports, 55 *a*, known as Sadler's case, the court resolved:

At common law, when the king was seized of any estate of inheritance or freehold, by any matter of record, were his title by matter of record judicial, as attainder ; ministerial, as by office ; or by conveyance of record, as by fine, deed enrolled, etc. ; or by matter of fact, and found by office of record on oath, as by alienation in mortmain, purchase by alien, etc., he who had right was put to his petition of right, in nature of a real action, to be restored to his freehold and inheritance.

In Stamford on Prerogatives, 72 *a, b*, the author says :

And this method of proceeding is proper, where the king seizes the goods or lands of a subject without due order of law, or enters into the lands of another without title or office found. Cited in Bacon's Abridgment, title Prerogative.

*Monstrans de droit* was allowed where the right of the party, as well as the right of the Crown, appeared upon the same record, or by another record of as high a nature as that upon which the right of the Crown appeared. 4 Coke, 55 *a, b*.

At common law, where the king was entitled by office, though untruly found, the party could not have a traverse to the office, nor could he avoid it without petition. 4 Coke, 56 *a* ; Stamf. Pre. 606 ; 6 Com. Dig., Title Pre. 67.

If the king be seized of lands or tenements by matter of record, he cannot be disseized or ejected ; but if any one enters, he will be an intruder upon the king's possession. And, therefore, if a man enter upon the king's *demesnes*, and takes the profits, it will be an intrusion ; for, as the king takes only by matter of record, he cannot be ousted of possession save by matter of record. An intruder cannot make a lease to maintain an ejectment ; nor can he maintain trespass. 6 Com. Dig., Tit. Pre. 67 and 64.

In the Year Books, 30 ed. 171, as early as the year 1302, we find the following recorded :

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To a writ of right brought against the Abbot of Saint Serle, it was answered that the tenements were seized into the king's hands, by reason whereof the abbot could not and ought not to answer. (Wescott.) Although the tenements are seized into his hands, you are tenant of the freehold. Judgment, if you ought not to answer. (Brompton.) He ought to answer; but inasmuch as we cannot entertain the suit while the tenements are seized, I advise that you who wish to sue for them do send to court to purchase permission, for we will hold no such plea before we are commanded so to do.

The following extracts are taken from the opinions in a very celebrated case of *The Bankers*, reported in 14 Howell's State Trials, p. 28, at about the year 1700.

There is nothing in the law so fenced and guarded and so sacred as the king's inheritance. Where that is concerned there must be petition *de droit*, an inquisition found, besides searches, etc. So careful is the law of the king's inheritance and revenue.

As the common law stood, wherever a title for the king was found by matter of record, though it was false, the party could not traverse it; so, where a title was found for the king which was true, but it was disclosed in the record that the subject had a good right which would avoid the title found for the king, yet, in that case, the subject could not be admitted to show it, but was so far concluded as to be put to his petition of right. *Monstrans de droit* was given by the statute 36 Edw. 3, and did not lie at common law (p. 78).

Suppose a man hath a rent-charge, or a rent-service, or other rent issuing out of land by prescription or grant, and this land comes to the king by grant or forfeiture, in all such cases the owner of the rent is put to his petition to the king, and hath no other remedy whatsoever (p. 81). By all the authorities (citing a large number), and by many others which I could cite, both ancient and modern, that if the subject was to recover a rent, or annuity, or other charge, from the Crown, whether it was a rent or annuity originally granted by the king, or issuing out of lands which by subsequent title come to be in the king's hands, in all cases the remedy to come at it was by petition to the person of the king; and no other method can be shown to have been practiced at common law. Indeed, I take it to be generally true that, in all cases where the subject is in the nature of a plaintiff, to recover anything from the king his only remedy at common law is to sue by petition to the person of the king (pp. 81, 82).

In *Barclay v. Russell*, 3 Vesey, 436, the controversy was in regard to some stocks in bank in London. Some records produced showed an apparent title in the Crown. The attorney-general was present but made no claim to it. As between the parties the court admitted the equity to be plainly with one of them. But the court dismissed the bill, saying that the court

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could not give judgment because it might affect the interests of the Crown suggested by the record. In this case the Crown was not a party.

In the following case, reported in 1 Addams, 255, the court refused to make any order, because it might be adverse to the reigning sovereign. The proctor of George III was cited to show cause why his will should not be exhibited and proved, at the instance of Olive, Princess of Cumberland, who claimed to be interested in it as legatee. The court say :

Now, the history of wills of sovereigns from Saxon times, from Alfred the Great down to the present day, has been diligently searched and examined, but no instance has been produced of probate having been taken of the will of any deceased sovereign in the courts, much less of its having been contested against any reigning sovereign.

This was a proceeding against the king's proctor, but the court held that it was on that account no less a proceeding against the reigning sovereign. The court had no jurisdiction to make any order affecting the interests of such sovereign.

Where the Crown is in possession, or any title is vested in it, which the suit seeks to divest or affect, or its rights are the immediate and sole objects of the suit, the application must be to the king, by petition of right. Mitford's Ch. Pleadings, 31.

In *Hovendon v. Lord Annesly*, 2d Schoales & Lefroy, 617, where both parties claimed as tenants of the Crown, the court say :

There being two grants at different rents, and one grant being more beneficial than the other, the court could not *rege inconsulto* make a decree; and I doubt whether the Court of Chancery has jurisdiction in such case to bind the Crown, and whether the proceedings should not have been, for that purpose, in the Exchequer. The decree ought to set the whole question at rest between the Crown and the different claimants, as well as between the claimants. I am called upon to act upon the mere right, and transfer the possession according to the mere right. It strikes me, if the proceedings had been at law in a real action, the defendants might have prayed aid of the king, and there could have been no proceeding without him, as the effect might be to prejudice his right and establish, as his tenant, a patentee at a less rent, and an ouster of the king's fee farmer, to the prejudice of the king. It is clear, therefore, this court could not proceed without the attorney-general, and I doubt whether it could proceed if the attorney-general were a party. . . . I take it, however, to be clear that the king's fee farmer cannot be ousted under a prior grant

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from the Crown without the king being a party, unless it be for the benefit of the king that he should be so ousted.

In 1 Anstruther's Reports, 215, the court—a court of exchequer—say, A. D. 1798 :

An ejectment was brought in the Court of King's Bench, February 10th, 1710, and it was, *as to part of it* at least, for lands which were part of the Queen's estate. There was an application to this court to stay the proceedings, and the parties were heard upon it. The attorney-general appeared, and after the hearing it was put off for a day or two. At length the entry was that an injunction issue *pro domina regina*, so that the action was not removed, but simply an injunction went to stay the proceedings. And I think I can see why that was. If the action had been removed, the question could not have been tried, even in the office of pleas, because you cannot try the Queen's title in an ejectment. The Queen was in possession ; her hands must be removed by some other course of proceeding than an ejectment, and therefore it was fruitless to think of removing it, and it remained under an injunction. It may be said that it might as well be left to the King's Bench to determine that they could not recover the queen's land in ejectment. To be sure they might if the prerogative of the King had not been that the King had a right to prevent that question being discussed there, and to have it discussed here, and that is what was done. See 5 Bacon's Abr. 569, 570.

An ejectment will not lie for lands belonging to the Crown, of which the Crown is in possession *by its officers* ; the proper remedy is by petition of right. Adams on Ejectment, p. 18.

The last case I will cite under this head from the English authorities is that of *Doe on the demise of Legh v. Roe*, 8 Meeson & Welsby, 579, decided in 1841 ; and I cite this in full because it is a comparatively late case, covers the whole ground, and shows the practice of the government in relation to it. It will be observed that the queen was not a party named in the pleadings, nor made a party by motion or otherwise.

This action was brought to obtain possession of a house and lot adjoining Hurst Castle, in which a person by the name of Watson had been placed in 1823 by the authority of the Board of Ordnance.

The attorney-general obtained a rule to show cause why the declaration should not be set aside and proceedings stayed. It was claimed by the plaintiff that by statute the Board of Ordnance was a corporation, and by statute authorized to sue and defend in actions of ejectment. The action it was urged was not brought to try any title of the Crown or to turn the Queen out of pos-

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session, but to establish affirmatively the title of the plaintiff to this particular piece of land.

The attorney-general said :

Such a proceeding is without precedent. You might as well bring ejectment to recover the Tower of London. If the plaintiff have title, he must proceed by petition of right. (Argument stopped by the court.)

Lord Abingdon, C. B. :

This rule must be made absolute. The only doubt I have had was whether the act of Parliament of the 1 and 2 George IV had not some application to this case. It is quite clear that the court could not issue any process to turn the Crown out of possession, and the only doubt I had was whether this property was not, by the operation of the act of Parliament, in the possession, not of the Crown, but of the Board of Ordnance. But, on looking more fully into the act, my doubt is entirely removed. It does not apply to any of the ancient possessions of the Crown, but only vests in the officers of the Ordnance, as a sort of corporation, certain messuages, manors, lauds, etc., which it recites to have been, at various times, purchased for the use of the Crown since the reign of Henry VIII, and we find the Board of Ordnance in possession for the Crown, but not in that sort of possession which is contemplated by the act of Parliament. The rule must therefore be made absolute.

Alderson, B. :

I am of the same opinion. No ejectment can be maintained against the Crown, to turn the Crown out of possession, by the authority of the Crown itself. The lessor of the plaintiff may proceed by petition of right. The statute 1 and 2 George IV, as it seems to me, has nothing to do with the case ; its only effect is to make the principal officers of the Ordnance trustees for the Crown for certain purposes of the Ordnance property, so as to prevent the necessity of its being transferred from one set of officers to another. I doubt very much whether the 9th section enables the Ordnance to defend an ejectment.

Rolfe, B. :

I am of the same opinion. The question may be tested thus : Suppose there were no trial, but judgment went against the casual ejector ; then there would only be a writ to turn the Crown out of possession, which clearly cannot be. On the other hand, there is no more difficulty in prosecuting a writ of right than an action of ejectment ; and although that remedy may be a more dilatory one, it presents no such incongruity and anomaly as in the case of an ejectment, which is to be followed by the issuing of a process that cannot be executed. Rule absolute.

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N<sup>m.</sup> a. Lord Abingdon, C. B., stated also, that he was "much disposed to think that no affidavit was necessary in support of such application, but that it was sufficiently made by the attorney-general appearing on behalf of the Crown."

Surely there can be no doubt as to what the law of England is, and has been during its judicial history, in a case like that before this court, and as to the proper practice in bringing before the court the motion we have made. In whatever form the question is presented, whether in a court of law or in equity, in the probate court or the court of exchequer, whether the Crown is a party or not, whether the action of the court is to affect the interests of the Crown directly or indirectly, the moment the court becomes informed that its action may operate adversely to the interests of the Crown without its consent, it invariably suspends all further proceedings. It recognizes the fact that to it the domain of sovereign power is forbidden ground, and that its judicial authority is to be so exercised as not in any manner to trespass upon the prerogatives, property, instrumentalities, or operations of this sovereign power.

If this be so, there can be no escape from the conclusion that this suit must be dismissed, unless it can be shown that there is a distinction between the courts of England and this country, or that there are statutes in this country making this distinction, which operate to bring this court to a different conclusion in this case.

Suggestion may be made that the law may be different in this country, on account of the difference between the foundation of courts in that country and in this. It may be said that in England the king is the foundation of justice, and that, for this reason, there would be an impropriety in suing him in his own courts, while here the judicial and executive functions are distinct, and controlled by different branches of the government. A little reflection will clear up any obscurity arising from such suggestion. The real difference is that in England the king is the sovereign; here the people are sovereign. In England the courts are of the king; here they are of the people. In both cases the courts are emanations of the sovereign power. In both cases property is held by the sovereign power; and it is on ac-

count of this *sovereignty* that neither can be made defendant in a suit except by consent. But it may be urged that in England there have been more exalted notions of the prerogatives of the king than we have been accustomed to recognize in this country. Now it is true that there are certain prerogatives of the king with which we have nothing to do. Those which pertain to his personal affairs and dignity, in distinction from those which he enjoys for the good of the public, may be regarded differently from what similar prerogatives of the chief executive in this country might be considered. The king may hold property in his personal capacity, in distinction from that which he holds in his sovereign capacity. As to the former the ruling of the courts might not be precedents to guide us in this country. There might, in relation to this, be some idea of kingly prerogative, which would be inapplicable here. But as to those prerogatives which he enjoys as a sovereign for the public good, and as to the property held by the Crown for the public, I can conceive of no reason why what is there regarded as essential for the proper and independent enjoyment of such prerogatives and property should not be so regarded in respect to our sovereign, the people of the United States. In relation to these questions of policy, propriety, expediency, and jurisdiction must be of the same nature, and must rest upon the same principles. In our own country the chief executive is not a sovereign. He, in his personal capacity, is subject to the law and to the jurisdiction of the courts substantially the same as a private citizen; and it is in relation to him, in comparison with the king, that we chiefly derive our notions of the greater extent of kingly prerogatives that are not regarded as guides for our action in our courts. But even here, when a suit was attempted to be made against the President, in his official capacity, by the sovereign State of Mississippi, in that august body, the Supreme Court of the United States, the court would *not even allow the bill to be filed*. 4 Wallace, 475. And it is very suggestive, too, that in this case the court would not allow Andrew Johnson, as a citizen of the State of Tennessee, to be enjoined, recognizing the force of the maxim, "*Quando aliquid prohibetur, prohibetur omne per quod devenitur ad illud*." When a thing is forbidden to be done, everything having a tendency

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towards its taking effect is also forbidden. Maxims are axioms which need no reasoning for their support, and this is peculiarly applicable to the case before us. For, if the United States cannot be sued directly for the purpose of defeating its title or destroying its force, can the same object be accomplished by a suit *in form* against private individuals? The Supreme Court refused to allow its records to be stained by the suggestion of a similar device.

But let us examine further the authorities of our own courts, to see how these principles have been applied in our own country. Call to mind the great case of *Chisholm v. The State of Georgia*, decided at the very earliest period of our judicial history, reported in 2 Dallas. It was there held by a divided court, that, by reason of the peculiar language of the Constitution, the State has consented to the jurisdiction of the Supreme Court in a suit against it by a citizen of another State. But such was the indignation and alarm at the consequences of such a construction, that within less than a month after the judgment, the following amendment was proposed by Congress, and in due time was ratified by the legislatures of the States :

The judicial power . . . shall not . . . extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any foreign State.

What would have been the attitude of a lawyer attempting to maintain the doctrine that the United States was liable to be sued in the court of Alexandria County ?

In No. 81 of *The Federalist*, the author says :

It is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent. This is the general sense and the general practice of mankind.

In *Cohens v. The State of Virginia*, 6 Wh. 264, the court say :

A sovereign, independent State is not suable except by its own consent. This general proposition will not be controverted. As the United States are not suable of common right, the party who institutes such suit must bring his case within the authority of some act of Congress, or the courts cannot exercise jurisdiction over it.

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*United States v. Clarke*, 8 Peters, 444; see also 6 Wallace, 484; 9 Peters, 201; 1 Story's Equity Pleadings, sec. 69 and note.

In *Hill v. The United States*, 9 How. 389, the court say :

No maxim is thought to be better established or more universally assented to than that which ordains that a sovereign, or a government representing a sovereign, cannot *ex delicto* be amenable to its own creatures, or agents employed under its own authority, for the fulfilment merely of its own legitimate ends. A departure from this maxim can be sustained only on the ground of permission on the part of the sovereign or the government, expressly declared, and an attempt to overrule it or impair it on a foundation independent of such permission must involve an inconsistency and confusion, both in theory and practice, subversive of regulated order or power. *Upon the principle here stated*, it has been that, in cases of private grievance proceeding from the Crown, the petition of right in England has been the nearest approach to an adverse position to the government that has been tolerated, and *upon the same principle* it is that, in our own country, in instances of imperfect land-titles, special legislation has been adopted to permit the jurisdiction of the courts upon the rights of the government.

Even in cases where the United States, as a plaintiff, has instituted suits against private individuals, and has given them in such cases the right of set-off, the court will not permit a judgment against the United States for the excess of such claim over the claim of the United States. *Reeside v. Walker*, 11 How. 290; *De Groot v. United States*, 5 Wallace, 431; *United States v. Eckford*, 6 Wallace, 484. Neither can a judgment or decree be given against the United States for costs. *United States v. Boyd*, 5 How. 29.

This principle will not be controverted, and perhaps an apology is due for quoting so extensively to establish so plain a proposition. But I have done so because I desired to show that, in every form in which the question has been presented, our own courts have shown the same sensitiveness to encroaching upon the prerogatives of our sovereign as has been shown by the courts of England in regard to those of her sovereign, and upon the same principles, that the opinions and acts of judges in both countries have been tinged with the same spirit, and tend to the same results; from which it must of necessity be inferred that, as in England, such spirit and such principles compelled the

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courts to hold that an action of ejectment would not lie against lands held by the Crown, so here lands held by the United States are exempt from such suit, though the United States is not made defendant upon the record.

I think that I have sufficiently established both by the principles of an ejectment suit and by the decisions of the courts, that this suit in ejectment is, at least, a suit against the *property* of which the United States is in possession under a title of record ; that it is substantially a suit *in rem*, not a *personal* action merely against the persons named, but a *real* action. This being so, let us see what the decisions are as to the *property* of the United States in such a situation.

In the case of the *People v. Ambrecht*, 11 Abbott's N. Y. Pr. Rep. 97, decided in 1859, and cited in Brightly's New York Digest, page 1178, as having been affirmed by the Court of Appeals of that State, suit was brought at the instance of Gerritt Smith, in ejectment, to recover a portion of the land occupied by Fort Ontario of the United States, at Oswego, and process was served upon a soldier in charge. After saying that such process was not properly served, for the reason that such soldier was not an occupant in the sense contemplated by the statute, and that "the premises, so far as they were occupied at all, were occupied by the United States," W. F. Allen, J., further says :

As the United States are not suable of common right, the party who institutes such suit must bring his case within the authority of some act of Congress, or the court cannot exercise jurisdiction in it. Ejectment, therefore, could not be brought against the United States any more than an action of assumpsit, and it seems to follow that they cannot be indirectly sued in the person of their agents and officers, and the title and claim thus subjected by indirection to the jurisdiction of the State courts. In theory it is unreasonable, and in practice it might prove mischievous by bringing the State and national sovereignty in conflict. The State, by its militia, would be bound to execute the powers of its courts, and give possession, in pursuance of ejectment, while the United States might be disposed to retain possession of its fortifications and barracks by a resort to force, if necessary. Suppose that by the time judgment and a writ of possession should be awarded to the plaintiff the defendant should be court-martialed or superseded, and a body of United States troops should occupy the fort, of what avail would be the power of the State court and the *posse* of the country to the plaintiff, in obtaining

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possession of the premises? Certainly the judgment in an action against a soldier would not bind the United States, or estop them from claiming title in hostility to it.

In the case of *The Othello*, 5 Blatchford, 342, the vessel and cargo were libelled *in rem* on account of a bottomry-bond, given by her master on the vessel and cargo. The vessel had been chartered by the government. The court say :

The cargo belonged to the United States, and was in their possession as shippers of it. As such it was not subject to seizure or attachment, nor could a suit be instituted against the government in respect to it.

In *The United States v. Barney*, 3 Hughes, *infra*, in the United States court of Maryland, in 1810, the defendant was indicted for obstructing the mail, in detaining a horse used in the service of the United States. His defence was, that under the laws of Maryland he had proceeded against the driver for a claim against him, and had taken the horse from him under such law and proceedings. The court, Winchester, J., overruled this defence, saying :

The United States cannot be sued. Suability is incompatible with the idea of sovereign power. The adversary proceedings of a court of jurisdiction can never be admitted against an independent government, *or the public stock or property*.

In the case of *The Siren*, 7 Wallace, 152, the vessel had been captured as prize at Charleston. On her way to Boston she ran into and sunk the sloop Harper. She was libelled in Boston, and condemned as lawful prize and sold. In the proceedings the owners of the Harper intervened, asserting her claim for damages occasioned by the collision. The court say at the outset :

It is a familiar doctrine of the common law that the sovereign cannot be sued in his own courts without his consent. The doctrine rests upon reasons of public policy, the inconvenience and danger which would follow from any different rule. It is obvious that the public service would be hindered and the public safety endangered if the supreme authority could be subjected to suit at the instance of every citizen, and consequently controlled in the use and disposition of the means required for the proper administration of the government. The exemption from direct suit is, therefore, without exception. This doctrine of the common law is equally applicable to the supreme authority of the nation, the United States. *The same*

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*exemption from judicial process extends to the property of the United States, and for the same reasons. As justly observed by the learned judge who tried this case, there is no distinction between suits against the government directly and suits against its property.*

In the same case the court say :

Even where claims are made liens upon property by statute, they cannot be enforced by direct suit, if the property subsequently vest in the government. . . . So, also, express contract liens upon the property of the United States are incapable of enforcement. A mortgage upon property the title to which had subsequently passed to the United States would be in the same position as a claim against the vessel of the government, incapable of enforcement by legal proceedings.

The equity of redemption held by the government, therefore, could not be foreclosed by an advertisement and sale, under a power of sale in the mortgage.

In the case of *The Davis*, 10 Wallace, 15, the court, announcing the same principles, say :

No suit *in rem* can be maintained against the property of the United States when it would be necessary to take such property out of the possession of the government by any writ or process of the court.

As to what shall constitute such possession, the court say :

The possession of the government can only exist through some of its officers, using that phrase in the sense of any person charged on behalf of the government with the control of the property, coupled with its actual possession.

This case cites with approval the case of *Briggs v. The Light-Boats*, 11 Allen Mass. Rep. 157, where these principles are most elaborately discussed. In *Case v. Terrell*, 11 Wallace, 199, where the court below had rendered a judgment affecting the interests of the United States in a suit to which it was not a party, the court expressed its amazement that a court of the United States could be found that would render such a judgment, and, with all the impatience that it is proper to attribute to that tribunal, referred to the fact that it had repeatedly held that this could not be done.

The State of Virginia has provided by express statute modes

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of proceeding where individuals have claims against the Commonwealth in certain cases. Chapters 44, 109, 110, Code of 1873 ; see, also, 12 Grat. 564; 5 Leigh, 512. But the courts would no doubt look with amazement upon the lawyer who would attempt to maintain an ejectment for lands in the possession of the Commonwealth, under claim of title, especially a record title upon office found.

It may be proper in this connection to notice some principles which, without some discrimination, might appear to be not in perfect harmony with the doctrines we have just shown. It has been held, for example, that the United States in its business relations is subject to the same laws and liabilities as private individuals. Thus, in the case of the *United States v. Wilder*, 3d Sumner, 308, it was held that the property of the United States on board a vessel was liable for salvage the same as the property of a private individual, and because the United States was plaintiff in that suit the lien was enforced. But had the United States been defendant, although the lien attached as though it were the property of a private individual, it was held that it could not be enforced. There was the same right but no judicial remedy. The same distinction was made in the case of *The Siren*, 7 Wallace, and in the case of *Briggs v. The Light-Boats*, 11 Allen. So, liabilities in the case of contracts are the same as in the case of individuals, but there was no remedy for their enforcement until Congress established the Court of Claims, in which the citizen is permitted to file his petition. The meaning, then, of the general statement, that in such cases the United States is subject to the same liabilities as private individuals, is, that it is so so far as the right is concerned, but not necessarily so concerning the remedy. When the United States is plaintiff it is liable to be met with the same defences as though it were a private citizen.

Again, when the United States is not in the possession of ordinary property, and does not have a record title, liabilities against it may be enforced. This distinction was taken in the case of *The Davis*, 10 Wallace, where cotton which had been captured from the Confederate States was held liable for salvage, the proceedings to enforce the lien having been instituted and the

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cotton seized *before it came to the possession of the officers of the United States*. This principle would not apply, however, where the property is being actually used for governmental purposes.

The lien can only be enforced in the courts in a proceeding which does not need a process against the United States, and which does not require that the property shall be taken out of the possession of the United States. *The Davis*, 10 Wallace; see also Chitty on Prerogatives, ch. 13, sec. 1.

So also, where the United States, or a State, becomes a stockholder in a private corporation, and even where it creates a corporation, and is the sole owner of the stock, it has been held to surrender or waive its prerogative of sovereignty in some respects. It could not otherwise transact business; though in the case of 15 How. 309, where a State was the sole owner of stock in a corporation, the United States court put their decision upon the ground that they were bound to follow the decision of the State court, and that in that case the State had consented to the jurisdiction; and in *McCullough v. Maryland* it was held that such stock of the United States was not liable to taxation by the State authorities.

It has also been held that in a suit between individuals the decision is not to be affected by reason of its ultimate effects upon the rights of the State or nation. Thus in a suit against a collector of taxes for the wrongful collection of the tax, the State may be interested, but it will readily be seen that the State is not *directly* affected by the result. Judgment is not against the State, nor does process issue against the State or its property, nor does it affect it only by the consent of the State in a subsequent and independent proceeding. These distinctions are clearly explained in *Case v. Terrell*, 11 Wallace, 199.

In the case of *Fowler v. Lindsey*, 3 Dallas, 411, which was an ejectment suit between individuals, growing out of a controversy as to whether the land was in New York or Connecticut, the court refused to regard it as a controversy between two States, because a decision as to the right of the soil between individuals did not decide anything as to the jurisdiction as between the States, neither of the States being nominally or *substantially* parties to the suit.

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But surely it must be easy to see that such cases are far different from cases where the direct effect of the judgment and consequent process is to divest the State of its possession and to change its relations to the property. As we have before seen, the direct effect of judgment and execution of final process for the plaintiff in this case would be to turn the United States out of possession and to set aside its title, which could be re-established only in a case where the United States would be plaintiffs.

Perhaps the principle we are contending for may seem less surprising when we recall to our minds the familiar doctrine that property in the hands of an officer of the government cannot be attached: 4 How. 20; 9 Peters, 201; nor when *in custodia legis*: 6 Md. 1; and that even a receiver of a court cannot be sued as to property in his hands, as such, without the permission of the court of which he is the officer.

It must be borne in mind that in this case three leading facts occur: 1st. Possession; 2d. Record title; and 3d. Governmental use.

It is possible that in some cases it may be found that suits of this kind may be maintained; but, if so, I think that it will be seen that some one or more of these elements are lacking. It is not necessary for us to argue such a case. It has been contended that property held by the government as private property is held, and without being in actual use for the purposes of the government, may be distinguished from that in actual governmental use. But that is not this case, and it is not necessary to affirm or deny that such distinction exists. We may say, however, that it would not be reasonable or practicable to make such distinctions as to separate portions of property where only one piece is in controversy, especially in a court of law.

My attention has been called to the case of *French v. Bankhead*, reported in 11 Grattan, 136, where suit was brought in ejectment against the general in command of Fortress Monroe, to recover lands claimed to be owned by the United States adjacent to that fort. In regard to this it may be said, first, that no question was made as to the jurisdiction of the court, and there was no decision upon the point now before this court. So far as the case shows, it does not appear but that the United States con-

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sented to allow the court to pass upon the merits of the case. In the second place, an examination of the case will show further that this question could not have been presented as it is in this case. The United States could not have suggested that it had a record title, for this was the precise question disputed upon the trial. The question was, whether the records produced were to be so construed as to embrace and describe the property in dispute. In this case the decision was in favor of the United States in both the original and appellate courts, and no opportunity occurred to show what might have been the result if final process against the United States had been sought to be enforced.

It was gravely argued, in a memorial presented by this plaintiff to Congress for an act authorizing him to have his rights adjudicated by the Court of Claims (possibly realizing the difficulties of proceeding in any court without the authority of Congress), that the United States had no right to acquire the title to this property without the consent of the Legislature of Virginia, and this view was earnestly contended for by Senator Johnston in advocating this bill in the United States Senate.

In regard to this it may be said, first, that it presents a question for adjudication by the court, but to hear it the court must have jurisdiction and the right to determine it. But if we are right in the position we have taken, it is one that cannot be discussed at this stage of the case, nor until it is first determined that the court has the right to question the title of the United States. But we say that such a claim is entirely unfounded. It is true that where the United States becomes the owner of real estate in a State, it does not thereby obtain the power of exclusive legislation over it without the consent of the Legislature of the State. The jurisdiction and power of the State still extends over it. But there is a wide distinction between *sovereignty* and *title* to real estate; and there is no reason why the latter should not be acquired without the acquisition of the former. This distinction is plainly made by Vattel, book 2, sec. 83, in reference to states which are in all respects foreign to each other. He says :

What is called the *high domain*, which is nothing but the domain of the body of the nation, or of the sovereign who represents it, is

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everywhere considered as inseparable from the sovereignty. The *useful domain*, or the domain confined to the rights that may belong to an individual in the State, may be separated from the sovereignty, and nothing prevents the possibility of its belonging to a nation in places that are not under her jurisdiction. Thus many sovereigns have fiefs and other possessions in the territories of another prince. In these cases they possess them in the manner of private individuals.

The kingdom of Great Britain and other nations have real estate in the District of Columbia. If, then, a nation may have property in a foreign state, may not the United States have property within her territorial jurisdiction, even though it also be within the territory and jurisdiction of one of the States?

But we do not choose to rest upon this theory alone. The United States is not an alien and a foreigner in Virginia. We claim to be citizens of the United States as well as citizens of Virginia. True, there was a time when a considerable portion of the people of the State attempted to repudiate the claims of the United States upon them, and proclaimed that all they desired was to be let alone. True, in later days, a few regarded it as an invasion for the United States to place her soldiers within the borders of our sacred soil. But this idea is now pretty well exploded. We have been reconstructed. The general sentiment is far different. We are all loyal to the United States. We are willing to *serve* the United States, as no doubt our chief magistrate can abundantly testify. Virginia *is not* a sovereign State, in the full sense of a sovereign power. It never had the power of declaring war, making treaties, coining money, establishing a navy or post-offices, or laws of naturalization, nor many other powers and prerogatives, universally regarded as pertaining to sovereign nations. Until the Declaration of Independence it was a colony of Great Britain. Its people joined with the people of the other colonies in proclaiming their absolution from allegiance to the British Crown, as "United Colonies." As such they joined in a confederation, and so remained until the adoption of our Constitution by the people of the country, under which the United States exists as a nation, supreme within its sphere. As such, it has jurisdiction throughout all the territory occupied by the States, as well as in the Territories. It has the usual incidents of a

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nation. It has the right to acquire both real and personal property for governmental and national purposes. If necessary, it has the right to condemn property for its uses. It could acquire title by confiscation, and declare forfeiture even without office found. 5 Wallace, 268. It has the right to take real estate in payment of debts, to sell it upon execution, and purchase it at such sale. This right has been exercised without question from the beginning of its existence. It holds real estate in every city and in every part of the country. It has the right to tax property everywhere within its borders. This right was exercised by the imposition of a direct tax upon the property in question. The taxing power is conceded by all to be far-reaching and all-pervading. It is one of the highest attributes of sovereign power. As is said in *McCullough v. Maryland*, 4 Wh. 316:

It is an absolute power, which acknowledges no other limits than those expressly prescribed in the Constitution, and, like sovereign power of every other description, is trusted to the discretion of those who use it.

Under this power the government may declare a forfeiture for non-payment, and may, if it chooses, declare such forfeiture, especially upon inquisition and office found, to result in transferring the title to the government. It was by virtue of a power of such transcendent magnitude that the title to this property appears to have been acquired. Whether this power was executed according to the terms of the law or not, it is not now proposed to discuss. It is sufficient for the present purpose to say that the United States had the *right* to acquire the title to this property under an act of Congress, passed by virtue of its taxing power, and which expressly conferred upon its officers power to purchase real estate for the government for the purposes enumerated by the law, and such right could not be questioned except by attacking the constitutionality of the law itself.

It is refreshing to emerge from the stifling fog and malarial obscurity which beclouds the understanding, dwarfs the spirit of patriotism, and confuses the judgment, when we are seeking for reasons to limit the capacity of our government so as to render it incapable of holding property within its borders for purposes

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necessary to carry on its operations without the gracious permission of State legislatures, to the serene atmosphere and clear sunlight which inspires such utterances as are found in *Kohl v. The United States*, 1 Otto, 367.

In speaking of the condemnation of real estate under the power of eminent domain, which is said to be the offspring of political necessity, and inseparable from sovereignty, the Supreme Court say :

This power cannot be enlarged or diminished by a State. Nor can any State prescribe the manner in which it must be exercised. The consent of a State can never be a condition-precedent to its enjoyment. Such consent is needed only, if at all, for the transfer of jurisdiction, and the right of exclusive legislation, after the land shall have been acquired.

Why should it be said that the consent of the Legislature of a State is required to enable the United States to hold its title to real estate, acquired for its governmental purposes, under the boundless power of taxation, which is also an incident of sovereignty and the offspring of political necessity, any more than when acquired under the power of eminent domain, which is certainly limited by the condition-precedent of giving compensation ?

But it may be argued that conceding the right of the United States to hold real estate in Virginia without the consent of the Legislature, yet as this title has been acquired, if at all, without such consent, therefore it is still subject to the laws and jurisdiction of Virginia ; and even though proceedings might not be commenced in the courts of the United States against the United States or its property, yet such proceedings might be instituted in the courts of Virginia, as was done in this case ; and although the case has been removed to this court, the rights of the parties are not affected by such removal.

The first suggestion in answer to this is, that this is one of those cases which, under the Constitution and laws of the United States, both the defendants and the government have the *right* to have transferred to the courts of the United States. They have the *right* to have especially all questions relating to the revenue laws of the United States heard and determined by the courts of

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the United States. When such transfer is made, it is no longer within the jurisdiction of the courts of the State. The subject of the controversy is no doubt subject to the laws of the State, and all questions are to be decided according to the laws of the State as well as of the United States applicable to it. But it is not in the judicial power of the State; it is in the judicial power of the United States, where the parties had the right to place it, and to have it adjudged and determined according to principles applicable to the courts of the United States.

But let us consider the case as though it were still in the State court, and as though the State and national jurisdictions were entirely independent of each other. It will not be contended, I presume, that the interests of the United States would be regarded with less consideration than those of a foreign state or nation, and it may be proper to consider a few of the authorities in such cases.

In Story's Equity Pleadings, section 69, the author says, after stating that where the interests of the Crown are involved, or it is sought to divest or affect its rights, the proper mode of redress is not by bill, but by petition of right.

A similar exemption from being sued applies to the case of foreign sovereigns, for they are not suable in the courts of a foreign country, although they may be found personally within the dominions of such foreign country.

In *Wadsworth v. The Queen of Spain*, 17 Q. B. 171, decided in 1851, the syllabus is :

Property in England belonging to a foreign sovereign prince in his public capacity cannot be seized under process in a suit instituted in this country on a cause of action arising here, and, therefore, where a suit had been brought in the lord mayor's court against the Queen of Spain, upon bonds of the Spanish government, bearing interest, payable in London, and moneys belonging to her, as the sovereign of that country, had been attached in the hands of garnishees in London, to compel her appearance, the Court of Queen's Bench granted a prohibition. Although the action was not in form brought against the Queen of Spain as sovereign, it appeared sufficiently, by the proceedings, that she was charged with liability in that character. The garnishee, in such case, may move for a prohibition, and it is no objection that he has put in a plea to such attachment.

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The court, Lord Campbell, C. J., is very severe in his condemnation of such a proceeding. Among other things, he says :

I must express my very great regret that the action should have been brought. I have no hesitation in saying that such actions do not lie, and am very sorry to find that this has been persisted in.

This case is well worth examination, as is also the case of *The Duke of Brunswick v. The King of Hanover*, 6 Beaven, 1, where these principles are elaborately discussed. It will be observed that an attachment is a proceeding *in rem* ; that it may be prosecuted to judgment without the appearance of the owner, and that the action, as stated in the syllabus, was not *in form* against the sovereign.

To show the extreme regard for the interests of foreign powers in property they may have in this country by the Supreme Court of the United States, I call special attention to the case of *The Exchange*, in 7 Cranch, 117. In that case, a vessel in the possession of the officers of the government of France was libelled by its former owners, who claimed that their title had never been divested. No one appeared on behalf of the French government, but at the instance of our own executive department the attorney-general appeared and suggested that it involved the interests of that government, and the case was heard upon issue made to such suggestion. All the questions relating to the jurisdiction of our courts over the property of foreign powers were carefully reviewed by Chief Justice Marshall, who held most emphatically that they have none whatever, and especially where such property is used for national purposes.

This case, too, it will be observed, was decided without the appearance of the French government, and without its appearing from the record that it was a party to the suit.

In *Harris v. Dennie*, 3 Peters, 292, an act of Congress had provided that goods imported from a foreign port could not be removed until the owner had obtained a permit from the officer of customs. They were held to be, until that time, in the possession of the United States. Held, that for this reason an attachment by a State officer on behalf of a creditor of the owner of the goods would not lie. The court say :

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An attachment of such goods, by a State officer, presupposes a right to take the possession and custody of those goods, and to make such possession and custody exclusive. If the officer attaches upon *mesne* process, he has the right to hold the possession to answer the exigency of the process. If he attaches upon an execution, he is bound to sell, or may sell, the goods within a limited period, and thus virtually displace the custody of the United States. The act of Congress recognizes no such authority, and admits of no such exercise of right.

In the case of *Briggs v. The Light-Boats*, 11 Allen, 177, the State court was asked, under an act of the Legislature of that State, to enforce a lien given by the statute to builders of a vessel upon such vessel, after it had been transferred to the use of the United States. The court admitted the existence of the lien, but held that there could be no remedy in the courts. After delivering an opinion of extraordinary elaboration the court say :

In every aspect in which we can look at these suits, in the light of principle or authority, we cannot escape the conclusion that the State courts have no jurisdiction or right to entertain them.

In *United States v. Weise*, 2 Wallace, Jr., 72, Grier, J., says :

Even if the State of Pennsylvania had power to tax lands, *where the jurisdiction over the lands had not been ceded by the Legislature*, payment of such tax could not be enforced by distress or seizure of property of the United States. To the extent of the powers granted, the United States are sovereign, and cannot be treated by the States as a mere corporation, a citizen, or a stranger, and subjected to distress or execution for claims, real or pretended, by any county or township officer. If the State of Pennsylvania has any just demand against the government for the use of her soil, recourse may be had to Congress, to whom an appeal for justice can always be successfully made, especially when the appellant is a State of the Union. There is no necessity for this humiliating spectacle of petty officers of a State distraining or levying on the public property of the General Government, and treating it as a petty corporation or an insolvent or absconding debtor.

When the court of the State of Maryland attempted to compel the officer of a branch bank of the United States to use stamped paper in issuing its notes, according to an act of the Legislature of that State, the Supreme Court of the United States said, in *McCullough v. Maryland*, 4 Wh., it should not be done.

If these States in the exercise of their exalted power of taxa-

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tion for public uses could not affect the operations of the government, or interfere with its property, how much less ought the courts, in behalf of private interests, to place the government in the position so graphically portrayed by Justice Grier.

I now propose to analyze a number of authorities which have been furnished me by counsel for the plaintiff, and to which my attention has otherwise been called as apparently in opposition to the principles for which I have been contending. I shall endeavor to bring out the precise points decided in these, and I invite comparison of my statement of the cases with the reports themselves. But, before entering upon this, permit me again to state the precise principle upon which I rely. It is not (though some of the cases might possibly justify me in so doing) that a suit could not be maintained where simply the interests of the government may be affected. It is not that such suit could not be maintained where the government seizes upon property without color of title, nor where the government claims title without possession or government use, nor where the government is in the use of property, if it could be, without possession or color of title. None of these constitutes our case, and it is unnecessary to maintain such a case, and authorities in such cases can have no controlling effect. Our position is this: *That where the United States is in possession of real estate through its officers, and has been in such possession peaceably for a considerable period, under a title of record valid upon its face, the result of what is equivalent to office found, using it in the proper exercise of its sovereign powers, a suit in ejectment cannot be maintained upon process served upon its officers and agents, when the court is properly informed through its proper officer that it claims exemption from suit and expressly objects to the jurisdiction of the court upon this ground.*

I confidently assert that no authority will meet a case where all these things concur, and that every case which can be cited differs from this in one or more material and vital particulars.

The first and apparently the most formidable case, for it is a leading case, and the basis of most of the others, cited is *Osborne v. The Bank of the United States*, 9 Wh. 856. I propose to bring out this whole case to analyze it as thoroughly as possible, in order to show the precise questions decided and the true prin-

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ciples established thereby. This case is cited in support of a general principle there laid down, that jurisdiction depending upon parties has relation to the actual parties upon the record. Chief Justice Marshall thus states it :

It may, we think, be laid down as a rule, which admits of no exception, that in all cases where jurisdiction depends upon the party, it is the party named in the record. Consequently, the eleventh amendment, which restrains the jurisdiction granted by the Constitution over suits against States, is of necessity limited to those suits in which a State is a party on the record. The amendment has its full effect if the Constitution be construed as it would have been construed had the jurisdiction never been extended to suits brought against a State by the citizens of another State or by aliens. The State not being a party on the record, and the court having jurisdiction over those who are parties on the record, the true question is not one of jurisdiction, but whether, in the exercise of its jurisdiction, the court ought to make a decree against the defendants ; whether they are to be considered as having a real interest or as being only nominal parties. . . . The parties must certainly have a real interest in the case, since their personal responsibility is acknowledged, and if denied could be demonstrated. . . . It is believed that no case can be found where any person has been considered as a party who is not made so in the record.

As to this, in the first place, I remark that this statement is that of a general principle, and much broader than was necessary to decide the precise case before the court. It has been said, and it is manifest to the judicial mind, that it is unsafe to interpret language used in reference to a particular case before the court as settling general principles as to cases not before the court and of a different nature, and not in the minds of those using the language. See upon this point *Cohens v. Virginia*, 6 Wh. 399 ; and *Peyton v. Bliss*, 1 Woolworth, 170. So far as the general principle stated is necessarily applicable to the case in reference to which it is used and to *like cases*, it is authority ; but when cases of *different nature* are in contemplation, it is *obiter dicta* to the extent of the difference between the cases.

Now let us see what was the precise case before the court and the precise point decided ; the Legislature of Ohio, representing a strong public opposition to the United States Bank, passed an act directing that if, after the 15th day of September, 1819, it continued to transact business in the State it should be liable to

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a tax of \$50,000 on each office of discount and deposit, and in such case directed the auditor to make out a warrant, directed to any person, authorizing him to enter the banking-house and seize the money if not paid, and if necessary to go into every room, open every chest, etc. On the 14th of September a bill was filed for an injunction against the auditor. The auditor was served with subpoena and indorsement of bond for injunction early on the 15th of September. After that, to wit, on the 17th of September, one Harper, who had been employed to collect the tax, entered the bank and violently seized \$100,000. While taking this to the capitol, he was served with the injunction. He took it, however, to the State treasurer and delivered it to him. It passed to his successor in office, who, though he passed it upon the books to the credit of the State as revenue, kept it in a separate package. The bill was filed against the auditor and was afterward amended by making Harper and the treasurer parties defendants. A decree was made directing them to restore the money, and they appealed to the Supreme Court of the United States.

The principal points made were that the bank could not sue in the United States court; that it was a case for a court of law and not for a court of equity; that the law of Ohio was constitutional and justified the act; and that, as it was a suit against the officers of a State, having a direct effect upon the property of the State, such suit was prohibited by the eleventh constitutional amendment. It will thus be seen that this was in reality a contest between two sovereign powers, the State of Ohio and the United States, initiated by the State of Ohio, having for its object the destruction of one of the instrumentalities of the sovereign power of the United States, and invoking the principle of immunity from suit for the very purpose of being permitted to commit the injury against sovereign power which this immunity from suit is designed to prevent. The point under discussion, when the statement of the above general principle was made, was the interpretation of the eleventh constitutional amendment, which declares that the judicial power shall not be construed to extend to suits against a State by citizens of another State or alien. The court say the interpretation is to be made by considering the

*words.* English cases will throw but little light upon it. This amendment is but a limitation upon the judicial power originally granted by the Constitution. It is therefore necessary to determine what was originally granted. Illustrations are then given to show that the original grant of judicial power was to enable the court to take jurisdiction over States where they were made *parties upon the record*, and, as decided by the Supreme Court before this limitation was made, where they were parties *defendants* upon the record. The amendment limits this judicial power only by denying it in cases where suits are *against a State* by citizens of other States and aliens. The original grant of power enlarged the jurisdiction of courts only to the extent of allowing States to be made parties defendants *upon the record*. Where States were interested but not named in the record, then jurisdiction would depend upon principles of common law. As this was the interpretation of the original grant of judicial power, and the eleventh amendment was simply a limitation of the original grant, both had reference to States when named as parties upon the record. The court say, therefore, that the eleventh amendment was not a prohibition to the suit. The question of jurisdiction depended upon principles aside from this, and in cases embraced by the limitation stood just as it would without either the original grant or the eleventh amendment. As the court say, "the amendment has its full effect if the Constitution be construed as it would have been construed had the jurisdiction never been extended to suits brought against a State by the citizens of another State or aliens."

Now, the general statement we have been considering was made for the purpose simply of interpreting the eleventh amendment, a subject with which we have nothing to do, and it was made, too, with particular reference to the case then before the court. So far as the interpretation goes, it is simple, direct, and plain, and is binding authority, but the general statement made in illustration merely, or *arguendo*, is not necessarily so, especially in cases of an entirely different nature.

The court did not mean to say that the courts would always take jurisdiction in cases where the interests of States or sovereign power are affected unless such State or sovereign power

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were a party on the record. If it did, it was unnecessary to say so for the purposes of that case, and can easily be shown to be incorrect. For example, in the case of *The Schooner Exchange*, 7 Wh., decided by Chief Justice Marshall himself, it was held that the court could not take jurisdiction, because it affected the rights of the French government, when, certainly, that government did not appear as a party to the record.

An act of Congress provides that the assignee of a chose in action shall not be able to sue in a United States court as a citizen of another State if the assignor could not. If such assignee, then, commences suit, it can then be shown that the court has no jurisdiction, because it has no jurisdiction over one not a party to the record. Many illustrations might be given to show that the statement cannot be correct as a universal principle applicable to every variety of cases. The English cases already cited do certainly show that it is not, as applied to an ejectment case. So the cases of *The Siren* and *The Davis* show that the rule would not apply in admiralty. It must be evident that language of a judicial opinion cannot be construed by the same rules as that of a statute.

Rules as to parties are different in different forms of action. They are unlike in cases at law and in equity, in admiralty and in ejectment. Proceedings *in rem* are different in this respect from mere personal actions. Jurisdiction may be obtained over property when it cannot over its owner, and so it may over persons when it cannot over the property to be affected. For example, a court of equity can take jurisdiction of a case affecting property beyond its jurisdiction where process can be served upon the proper persons. *Penn v. Lord Baltimore*, 3 Leading Cases in Equity. Now it would be very difficult to lay down a principle as to parties applicable to all such cases. Because a rule might be applicable in one, it would be unsafe to hold that therefore it is applicable to all. Take the instance of a case in equity where a necessary party is beyond the jurisdiction of the court, and for that reason process cannot be served. It is true that in most States proceedings *in rem* may usually be prosecuted by publication in such cases; but it has not always been so. In such cases the court say, in *Hagan v. Walker*, 14 How. 36,

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“Where no relief can be given without taking an account between an absent party and one before the court, though the defect of parties may not defeat the jurisdiction, strictly speaking, yet the court will make no decree in favor of the complainant.”

The court will refuse to proceed in all cases, and refuse to make a decree affecting his rights, if there is a party necessary over whom, for any reason, jurisdiction cannot be obtained. See 6 Wallace, 280; 7 Cr. 98; 17 How. 136.

In the case at bar the court cannot obtain jurisdiction over the United States, and yet judgment, according to the statute, cannot be obtained and enforced without defeating the title of the United States, and putting them out of possession. In 6 Wallace, 187, the court say, “The rule is universal that if the power be conferred to *render* the judgment or *enter* the decree, it also includes the power to issue proper process to enforce such judgment or decree.” It follows as a logical and absolutely necessary deduction from this, that, if it be ascertained that the court has not power to issue proper process for the enforcement of its judgment or decree, it has not power to enter them. Now, the reason that a decree was made and sustained in the case of *Osborne v. The Bank of the United States* appears, partially, in the language of the general statement we have been considering; and that is, that the court had jurisdiction over persons who had such relations to the property in controversy that a decree against them could be enforced which would effectuate the whole object of the suit. They had possession and control of the property in controversy. This will be more apparent from a more critical examination of the case. At the time of the commencement of the suit the property was in the *possession* of the bank. The defendant obtained it in violation of the injunction, but even then it never came to the full possession of the State of Ohio. The court had power to grant full relief by enforcing its process against the parties named in the record. It admits that if the property was in full possession of the State of Ohio the suit could not be maintained. The foundation of the bill was that the property had *not* gone into the possession of the State of Ohio. It was upon this ground that the suit was maintained as one suitable for a court of equity instead of a case at law, and the injunc-

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tion was granted for the purpose of preventing the defendant from delivering the property to the State of Ohio, *whereby the remedy would be lost*. It will thus be seen that the whole foundation of the case, the vital point and object of the bill, was to prevent a *change of possession*, to prevent the State of Ohio from obtaining possession. It was because this would have placed the State in such a situation that suit could not have been maintained that this suit in equity was sustained. The bill recognized and *rested upon* the very principle we are contending for, to wit, that the *possession* of sovereign power cannot be disturbed by judicial process. Without this principle the case itself would have been totally destitute of vitality. The bill alleges "that neither Currie nor Sullivan held the said money in their character as treasurer, but as *individuals*." The case, when properly understood, is a most complete vindication of our position. The "true inwardness" of this case is, that while a suit could not have been maintained if the property had come into the possession of the State, yet it could be maintained to prevent it from coming into such possession, and the State could not, by merely asserting its interest in the subject in controversy, and without being a party to the record, defeat the suit.

The court say : "Where the right is in the plaintiff, *and the possession is in the defendant*, the inquiry cannot be stopped by the mere assertion of title in the sovereign." The court say this because in that case the possession was in the *defendants* and not in the State. It says further : "In such case a friend of the sovereign may suggest it, but the court will go on and investigate the title if it has jurisdiction of the parties before it *who have possession* of the property." In the case at bar the defendants in the suit have not possession. The United States is in the actual possession, according to the definition of possession given by the court in the case of *The Davis*, 10 Wallace, as follows : "The possession of the government can only exist through some of its officers, using that phrase in the sense of any person charged on behalf of the government with the control of the property coupled with its actual possession," and in reference to which the court say, in the same case, the proceeding could be maintained only when it "does not need a process against the United States,

and which does not require that the property shall be taken out of the possession of the United States.”

Let it be borne in mind, too, that it is not *title* that we suggest, at least nothing more than a *prima facie* record-title. It is not a suggestion of *ownership* that we make or rely upon. We would not ask the court to try title or ownership on suggestion. We simply suggest facts, which are indisputable,—possession, record, and government use. We are not contending that a mere suggestion of interest in the property, or title thereto, without possession, record, or government use, would deprive the court of power to hear the cause. If the facts we suggest are disputed, then the court will investigate the cause sufficiently to determine their truth or falsehood. If found to be true, that is all we now claim ; if false, of course we fail, and the court will proceed.

Aside from these general expressions used “*arguendo*,” this case of *Osborne v. The Bank of the United States* is, in another point of view, one of the strongest cases that can be found in support of the positions we have taken.

In the first place, in speaking of the point as presented by the State of Ohio, in a case, as we have already seen, quite different from this, the Chief Justice says: “The full pressure of this argument is felt, and the difficulties it presents are acknowledged. . . . The very difficult question is to be decided whether in such a case the court may act upon the agents employed by the State and on the property in their hands.” Before passing to its discussion he deems it proper to pause and reflect upon the consequences of denying this power to a court of the United States, and he then goes on to show how the result would be to permit an attack upon the very sovereign power we are now endeavoring to maintain. Now, in that case, the great question to be decided, that which overshadowed all others, they being mere questions of jurisdiction, form of action, authority to sue, etc., was *the constitutionality of the legislative act of Ohio, the object of which was to impair and destroy, so far as it could, one of the means and instrumentalities of the government of the United States.* The State of Ohio had made an attack upon the sovereign power of the United States through its most formidable weapon, the sovereign power of taxation upon property within its jurisdic-

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tion. It was not an attack by a private citizen through a proceeding in a State court; it was the State of Ohio itself, speaking and acting by the whole force of its legislative and executive power, inspired by the most determined resolve to so impair the operations of one of the instrumentalities of the United States as to render it incapable of action there. Could this be permitted, was the great question in that case. Upon this question the great Chief Justice, aided by the discussions of Clay and Webster, brought the full force of his intellect, and the result was a complete vindication of the precise principle for which we are contending,—the entire independence of the means and instrumentalities of the United States government from all interference short of the sovereign power of the government itself.

The independence of such instruments from all interference has been carried to such an extent that the Supreme Court has held that a State cannot tax the income of an officer of the United States, *Dobbins v. Commissioners*, 16 Peters, 435, nor can the United States tax the income of a State officer, *Day v. Collector*, 11 Wallace.

The principle which we would present prominently, which, as we have seen, is not only in harmony with the case of *Osborne v. The Bank of the United States*, but is the leading idea upon which the bill in that case was framed, and which will be found to be the test which may be applied to nearly all of the cases cited by the plaintiff, showing them not to be in conflict with our position, is this: *Wherever the process necessarily growing out of the proceedings has the effect to take the possession of property from the sovereign power, to divest it of such possession and change it to an individual, without the consent of such sovereign power, express or implied, or where the suit has not been instituted by the sovereign, the suit by an individual will not be maintained.* In nearly all the cases the reason given has reference to this principle. The process of a court is its effective means of action. The proceedings in an ejectment suit do no harm to any one except by the final process, the writ of possession. In some suits process to take possession may issue at the commencement of the suit or during its progress; but it makes no difference in principle at what time such process issues. A process to take pos-

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session gives authority to the officer to use sufficient force to execute it. It authorizes the officer to put down such force as may be opposed to it. Now, if this process can be executed upon *parties to the cause*, and full effect given to it by the execution upon such parties, then it may be done; but if, in order to execute it, it becomes opposed to a sovereign power *not a party to the cause*, such sovereign power, not being a party, is not bound by the order of the court, and has the legal right to resist. It cannot be that an officer has the legal right to take possession from a sovereign and at the same time that the sovereign has the lawful right to resist. This would produce a collision like an immovable body being met by an irresistible force. It surely will not be pretended that the sovereign, if *not a party*, would be bound legally or morally to yield its claims on account of a judgment in a case in which it had not been heard. See 27 Grat. 301. However this may be, the principle above stated will be found to be the key to reconcile what otherwise might appear to be conflicting. Thus in the case cited from 8 Meeson & Welsby the court say: "The question may be tested thus: Suppose there were no trial, but judgment went against the casual ejector, then there would be a writ to turn the Crown out of possession, which clearly cannot be." In *Osborne v. The Bank of the United States* the writ had full effect by its operation upon the individuals named as defendants upon the record. It could not invite resistance by State authority, nor could it have been resisted by the State except upon its own motion, and not merely in opposition to the process. The reason of this principle is well stated in *The People v. Ambrecht*, 11 Abb. Pr. R.:

In practice it might prove mischievous by bringing the State and national sovereignty in conflict. The State, by its militia, would be bound to execute the process of its courts and give possession in pursuance of ejectment, while the United States might be disposed to retain possession of its fortifications and barracks by a resort to force if necessary. . . . Certainly the judgment in an action against a soldier would not bind the United States or estop them from claiming in hostility to it.

This was the precise principle applied in *Harris v. Dennie*, 3 Peters, and *Briggs v. The Light-Boats*, 11 Allen, and it is

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the reason why an attachment would not lie in a State court against goods in the custody of a United States marshal.

Let us now apply this test to some of the other cases cited by the plaintiff.

In the case of *Davis v. Gray*, 16 Wallace, 203, the receiver of a railroad company filed a bill in chancery to enjoin the governor and land commissioners of the State of Texas from issuing patents of lands claimed to belong to the company to other persons. Those lands had been granted to the company upon certain conditions, which it was claimed by the defendants had not been performed, and for which reasons that the lands had become forfeited. It was objected that this was equivalent to a suit against the State, though not a party to the record. The main question upon the merits was as to whether the obligation of contracts had become impaired by this action of the State officers. The court decided the case upon two grounds: one that the State of Texas allowed suits of this kind in its own courts, citing a number of cases; and the other is stated as follows, to wit:

. Here the property in question is not in *possession* of the defendants. The possession of the receiver has not been invaded. He has not been in possession, is not seeking possession, and there is no question in the case relating to that subject. . . . He is seeking to enjoin the appellants from doing illegal acts, which, if done, would render the right and title of the property in his hands of greatly diminished value.

The court could enjoin the governor as well as any other and inferior officer from doing an illegal and unconstitutional act.

In the case of *United States v. Peters*, 5 Cranch, 115, proceedings had been had in admiralty against certain certificates held by one Rittenhouse, who was treasurer of the State, and which were claimed to be proceeds of a vessel belonging to the State of Pennsylvania. It was claimed by the State authorities that as the State was not a party to those proceedings the court had no jurisdiction to decree against it, and that it was not, therefore, bound by the decree of the court, and the Legislature of the State passed an act declaring such decree to be void as against the State, and directing the governor to employ sufficient force to resist its execution. The district judge, Peters, submitted the question to

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the Supreme Court on a return to a writ of mandamus ordering him to show cause why he should not issue the writ notwithstanding the act of the Legislature. It was decided by Marshall, Chief Justice, that the court had jurisdiction notwithstanding the interest and claim of ownership suggested by the State. He says:

In this case the suit was not instituted against the State or its treasurer, but against the executrices of David Rittenhouse for the proceeds of a vessel condemned in the court of admiralty *which were admitted to be in their possession*.

After giving a history of the case, the court further say :

These circumstances demonstrate beyond the possibility of doubt that the property which is represented in the *Active* and her cargo was in possession not of the State of Pennsylvania but of David Rittenhouse as an individual, after whose death it passed, like other property, to his representatives. *Since, then*, the State of Pennsylvania *had neither possession of nor right to the property on which the sentence of the District Court was pronounced*, and since the suit was neither commenced nor prosecuted against that State, there remains no pretext for the allegation that the case is within that amendment of the Constitution which has been cited, and consequently that the State of Pennsylvania can possess no constitutional right to resist the legal process which may be directed in this cause.

In *Olmstead's Case*, Brightly, Pa., Nisi Prius Reports, the marshal was attached for not obeying the process of the court directing him to pay over the moneys described in the above case of Judge Peters, where the same principles were declared, and the decision was based upon precisely the same grounds, to wit, that the State was *not in possession, but was in the possession of Rittenhouse as an individual* while the suit was being prosecuted.

In the case of *Swazy v. Northern Central Railroad Company*, 71 N. C. Rep., S. C. 1 Hughes, 17, the State was not in possession of the property, but in possession of the railroad company. The court say :

The railroad company, therefore, in this case holds the share of its property represented by the stock subscribed by the State *in trust* as well for the stockholders as for the State. The charter made the company the *depository* of the pledge to hold it for both parties according to their respective interests.

This case was, however, decided substantially upon another ground, which I will presently show.

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The United States was not in possession in the case of *Elliott v. Van Voorst*, 3 Wallace, Jr., nor did the question of possession arise in the case of *Commonwealth v. Gray* in the same volume, 3 Wallace, Jr.

I think it may safely be said that in no case where this point has been decided has the court held that proceedings can be maintained in a suit against the sovereign where the necessary process is to *divest* such sovereign "*in invitum*" of the *possession* of the property in controversy. I think also that this principle is in harmony with all the cases which have been or can be cited. But a class of cases have been cited which, as we shall see, were decided upon another principle, not at all in conflict with the position we have assumed, to wit, *consent of the sovereign*.

In the case of *Swazy v. Northern Central Railroad Company*, 1 Hughes, 17, before alluded to, the facts were as follows: The railroad company had been incorporated by the State, and the board of improvement had been authorized to subscribe \$2,000,000 capital stock. In case it became necessary to borrow money, the State was authorized to issue certificates in sums of not less than \$1000 each, pledging the payment in thirty years, with interest at 6 per cent. As security the faith of the State was pledged, and *in addition* its stock held by the company was pledged for the same purpose, and dividends upon stock were to be applied to the payment of interest. This stock was made preferred stock. Subscription was made and certificates issued. A large amount of interest had accrued upon these certificates. An action was brought in chancery by the holder of seven of these certificates, in his own behalf and in behalf of others who chose to join with him, asking that a sufficient amount of State stock be sold to pay this interest. The objection was that the court did not have jurisdiction because it was against the property of the State.

After citing *Osborne v. Bank of the United States* in support of the position that a suit may be maintained where the State is not made a party upon the record, the court decides this point in the following words:

The real question, therefore, presented for our determination is whether the court has jurisdiction of the property which it is sought to charge or of the agent having it in possession. The property con-

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sists of shares in the capital stock of a corporation. At its inception it became charged as security for the payment of the debt contracted on its account. This was part of the law of its creation. It has always been pledged.

The property of a corporation represents its stock. This property the corporation holds for its stockholders. A stockholder's share of the stock is equal to his share of the corporate property. The railroad company, therefore, in this case holds the share of its property represented by the stock subscribed by the State *in trust* as well for the stockholders as for the State. The charter made the company the depository of the pledge to hold it for both parties according to their respective interests; consequently a suit which seeks to charge the stock as security and brings in the corporation to represent it may be maintained in the absence of the State as a party. This was evidently the understanding when the pledge was made. It was then the case as now that a State could not be sued, but that its agents could, and that property in the hands of its agents could be controlled and disposed of by the courts in proper cases notwithstanding the ownership by the State. The faith of the State had been pledged. This pledge the courts could not enforce. The stock to be obtained with the money borrowed could not be reached under such a pledge of faith alone, because a suit could not be prosecuted for that purpose. Notwithstanding this a lien was given upon the stock as security in addition to the pledge of faith. But it was no addition if the bondholder had no power to make his security available. A lien which cannot be enforced has no value as a security. These parties were engaged in no such vain work. It was clearly their understanding that the State not only should but that it in fact did grant to the bondholders the power to use the machinery of the courts to subject this portion of their security if default should be made in the payment of the debt. In sustaining this action, then, we are but carrying into effect the manifest intention of the parties at the time the money was borrowed.

Is it not perfectly manifest that the two leading ideas of this decision are, 1st, that the property in controversy is in the possession of the company in trust as a *depository*, and that therefore the power of the court can have full effect by operating upon the parties named; and, 2d, that the State, for the purpose of the enforcement of the trust, had *consented* to grant "the full power to use the machinery of the courts?" Were this not so the court say the giving a power to sell the stock to meet its liabilities, "in addition" to the faith of the State, which could not be enforced by suit, would have been a vain thing.

It has been held that a State, by becoming a member of a corporation, or by chartering a bank to be carried on in the usual

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course of banking business, *thereby* surrenders its prerogative of exemption from suit against such corporation or bank. Such act or charter is construed as a *consent* that its obligations incurred through such means may be enforced by the courts. This is indeed a necessity, for otherwise it could not do business in such capacity. Individuals would not deal with a party whose obligations could not be enforced.

This was the ground of the decision in *Briscoe v. Bank of Kentucky*, 11 Peters, 257. In that case the bank, which had been incorporated by the State and made liable to be sued, brought suit upon a note given to it. The defence was that the consideration was bills of the bank, which it was claimed, being issued by such bank, of which the State was sole corporator, were bills of credit issued by the State, and were therefore unconstitutional and void, for which reason there was no consideration. The question then was whether they were bills of credit in the sense contemplated by the Constitution. Bills of credit in that sense were defined to be bills issuing solely on the faith of the State. Such bills could not be enforced, for there could be no suit against the State. In issuing such bills it was not to be presumed that the State intended to do an unconstitutional act. Such construction was not to be given to the act unless necessary. As it had been held, citing *Bank of the United States v. Planters' Bank*, 9 Wh. 904, that when a government becomes a corporator it lays down its sovereignty so far as it respects such corporation; that therefore the bank could be sued and payment of its bills thus enforced, on account of which the bills did not rest solely upon the faith of the State; they were not bills of credit in the sense contemplated by the Constitution.

Justice Story, in dissenting from the opinion of the court, thought that as the State, being the sole owner of the securities of the bank, might at its pleasure by legislative act withdraw such securities, and thus leave nothing to rely upon but the faith of the State, the effect was that the bills had nothing but the faith of the State for her security, and therefore were bills of credit in an unconstitutional sense. But this precise question came up afterward in *Curran v. Arkansas*, 15 Peters, 304, where it was held that such action by the Legislature would itself in

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such case be unconstitutional, as impairing the obligation of contracts.

The leading idea of these cases is that the privilege of exemption from suit is in such cases *waived* and the jurisdiction rests upon *consent*.

The case of *The United States v. Bank of the Metropolis*, 15 Peters, 377, was where a suit was brought by the United States as plaintiff, and the defendant claimed off-set to an amount in excess of the claim. The principle announced is, "When the United States, by its authorized officer, became a party to negotiable paper, they have all the rights and incur all the responsibilities of individuals who are parties to such instruments. We know of no difference except that the United States cannot be sued." In this case off-sets were allowed and a judgment sustained against the United States for over \$3000.

But in later cases this has been refused. In *Reeside v. Walker*, 11 How. 290, the court say: "To permit a demand in set-off against the government to be proceeded on to judgment against it would be equivalent to the permission of a suit to be prosecuted against it." This cannot be tolerated "as against the government, except by a mere evasion, and must be as useless, in the end, as it would be derogatory to judicial fairness." . . . The court also say, it being the settled principle of our government that the sovereignty of the government protects it from suit even against judgments for costs, "it would be derogatory to the courts to allow the principle to be evaded or circumvented."

In *United States v. Eckford*, 6 Wallace, 490, the above extracts are quoted and affirmed, by which it seems very plain that in this respect the case of *United States v. Bank of Metropolis* is overruled.

Two or three cases have been cited, apparently for the purpose of showing that whatever may be the law of England upon this subject, or whatever may be the law where a sovereign's rights are to be passed upon by its own courts, in relation to property within its exclusive territorial jurisdiction, yet, that as to property of the United States within a territorial jurisdiction of a State obtained without the consent of the Legislature, this prerogative of exemption from suit is not to be applied.

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As to this, it is, it seems, apparent that the cases already cited by us as to the application of this prerogative in relation to States *entirely foreign to each other* are sufficient to establish the position that such a doctrine cannot be maintained. But even these cases I think do not so hold. Certain expressions used *arguendo* disconnected from the case in hand may convey such an idea, but the decision, taken as a whole, does not warrant the principle contended for, especially in such a case as this.

In *The Commonwealth v. Gray*, Brightly's Pa. Rep. 302, the defendant was indicted for selling land so held, as an auctioneer, in violation of a law of Pennsylvania, which prescribed that sales of land at public auction should be made only by a person commissioned by the governor. It was contended that the defendant was justified by having acted under the direction of the President of the United States, and that the law did not apply to land held by the United States, as it was not expressly named in the statute. But the court held that lands so held were in all respects subject to the laws and municipal regulations of the State. That in such cases the United States held land as an individual, and not as a sovereign. That the State is the sovereign over the land. That although the United States held the fee, yet sovereignty and title are separable from each other. That the United States held by the same tenure as an individual, and that the principle of law that a sovereign is not bound by a statute unless it is expressly named is inapplicable in such a case. This is, I think, a fair statement of the views of the court in that case.

It will be observed that much more is said than was necessary to decide the point then before the court, but I can see no inconsistency with the statement as made with the position assumed by us. There is no doubt but that lands so held are to be governed in all respects by the laws of the State as a general principle *when such laws do not trench upon some proper and necessary prerogative of the sovereign power of the United States*. In this case there was no attempt to disturb the possession of the United States, to impeach its title, to interfere with the means and instrumentalities of the United States in the exercise of its sovereign powers, or even to affect the interests of the United States in any respects whatever. An individual who was indicted for an

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offence against a statute law of the State attempted to bring to his aid the sovereign prerogatives of the United States for his own purposes, and this the court said he could not do. And that was really the whole of this case.

The case of *Elliott v. Van Voorst*, 3 Wallace, Jr., was as follows: The United States, upon a judgment against Swartwout, a defaulter, and sale upon execution, had bid in an equity of redemption upon land previously mortgaged. Afterward suit was brought to foreclose the mortgage. The United States was made a party, and the district attorney of the United States *appeared and filed an answer*, and submitted the interests of the United States to the court. Van Voorst became the purchaser at the foreclosure sale. After twenty years (during which the land had been built upon and immensely increased in value), Elliott, who, somehow, had procured an assignment from the United States, instituted another suit to recover, claiming that the equity of redemption had not been properly foreclosed. The court decided that, under the circumstances, this could not be done, especially in a collateral proceeding—a decision not at all in conflict with our position. But the court says:

In the mere exercise of a mere *corporate* right, the United States cannot claim the immunities or prerogatives of a sovereign. She cannot compel a mortgagee to the hopeless remedy of a petition to Congress and redeem. . . . When the government, in the exercise of the rights and functions of a *civil corporation*, purchases land to secure a debt, the accident of its sovereignty in *other functions* cannot be set up to destroy or affect the rights of persons claiming a title or lien on the same lands.

In the syllabus it says: "When it purchases land within a State *not intended for forts, arsenals, and other national uses*, but merely to secure a debt, it takes the land as any corporation, and cannot claim any of the immunities and prerogatives of a sovereign." But it also says: "The rights of the United States government as a sovereign, and its prerogatives as such, are coextensive with the functions of government committed to it." The whole case shows, by the strongest implication, at least, that, in relation to property, used for *public purposes*, the prerogatives of sovereignty are to be applied in full force even where the land is obtained without the consent of the Legislature.

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In 3 Story's Commentaries on the Constitution, section 1671, the author says :

Cases may, indeed, occur in which the individual may not always have an adequate redress without some legislation by Congress. As, for example, in places ceded to the United States and over which they have exclusive jurisdiction, if his real estate is taken without or against lawful authority. Here he must rely upon the justice of Congress or of the executive department.

In section 1672, he says this has sometimes been regarded as a serious defect. But if it is so, it is a defect of the Constitution itself. After suggesting the propriety of some legislation upon the subject, and commenting upon the petition of right as it exists in England, he says : "The republic enjoys a despotic sovereignty to act or refuse as it may please, and is placed beyond the reach of the law."

In the first extract the writer states positively that the property of the United States is exempt from suit in a case like the present, certainly in places within its exclusive jurisdiction. But it may be that in his manner of statement it may be otherwise implied, in places not within its exclusive jurisdiction. The statement undoubtedly does imply that he was not so certain in the latter case as the former. But that is all. It is a mere negative implication. He by no means intends to say that the same principle would not apply in the latter case. He is not professing to enumerate all the cases in which the principle is applicable. The main thought in his mind is the apparent hardship which sometimes results from this prerogative of the government, and gives as an illustration merely an example about which, in his view at least, there is or can be no question. It certainly would not be treating the author fairly to say that he gives it as his deliberate opinion that in cases not within the exclusive jurisdiction of the United States the rule would not apply, especially in a case like the present, where the property is being used as this is for public purposes. There is nothing to show that as to *this part* of the extract he gave it more than a passing thought.

In *The United States v. Fox*, Supreme Court United States, 4 Otto, 315, land in New York had been devised to the United States for the payment of the public debt. The law of New

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York did not permit such a devise. The United States applied for probate of the will, and it was resisted by the heirs. It was held that lands in New York could not be devised contrary to the law of that State, even though the devisee were the United States. The State has exclusive power to regulate the tenure of lands within its jurisdiction. This follows from her sovereignty. Title and modes of disposition of real property are not matters placed under the control of Federal authority. Such questions are to be determined by the laws of the State.

It is impossible for me to see anything in this bearing upon the question of the right of the United States to exercise its prerogative of exemption from suit as to property in a State in public use. It is nothing more than the statement of a general principle which all admit, that real estate within a State is subject to the laws and jurisdiction of the State. This is no doubt always so, except when any action in relation to it trenches upon the *prerogatives* of the United States.

This case asserts in the strongest manner the right and prerogative of the United States to acquire property for public use in any State, even, if necessary, in hostility to the express enactments of the Legislature.

It will be observed that in none of these cases cited upon this point was the property in controversy public property ; that is, in *public use* as one of the means of carrying on the government. I am sure that none of them show that the United States is deprived of any of its sovereign powers or prerogatives in relation to any property held by it which it has the *right to acquire* for its own public uses within its territory, no matter where it may be, nor that they hold them by the permission of State legislatures.

It will not be pretended that the United States can be sued directly in relation to such property. But why not, if they can be sued indirectly ? If it be pretended that the prerogatives of the United States do not extend as to property held under the exclusive jurisdiction of a State, why not bring a direct suit against it at once ?

The principle stated in the syllabus of the case of *Elliott v. Van Voorst* seems much more consistent : “ *The rights of the United*

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*States government as a sovereign, and its prerogatives as such, are coextensive with the functions of government committed to it."* 6 Peters, 570.

Perhaps a State might provide by law that the United States should not acquire title to real estate within its borders for private purposes, except through the exercise of some sovereign power of the United States, such as taxation, eminent domain, etc., and in such cases it might limit the rights of the United States. But when the United States proceeds or acts as a sovereign, where it has the *right to go and to act* in spite of the Legislature, it goes and acts as a sovereign, with all the prerogatives of a sovereign. Otherwise, it is not a sovereign power at all, but a mere subject or foreigner.

The cases we have heretofore cited show how a sovereign power, *entirely foreign*, is to be regarded; and certainly to show that the United States is to be treated with less consideration, the authority and the logic should be irresistibly clear, especially in view of the decisions of the Supreme Court in the case of *The Siren and the Davis*. The burden of the argument is certainly upon those who would establish such a distinction.

Prerogatives are, by the common sense of mankind, attributed to sovereign power for the sake of the public good and for the reason that they are considered proper and essential for the exercise of its functions. They enter into the very definition of sovereign power. As such, they pertain to all nations. There is the same reason for their belonging to the United States as to any other sovereign nation, and if the United States is a nation at all, it is, I contend, disrespectful to it to suggest that it is inferior in these respects to any other nation. So far as it has occasion and the right for the exercise of sovereign power, so far should it have the same privileges and prerogatives as are accorded to all other governments. I protest against the idea that it holds them in the exercise of its sovereign powers in subjection to any power whatever.

It cannot be denied that in England ejectment for the recovery of lands in the possession of the Crown cannot be maintained. But it has been suggested that a reason exists there for this that does not exist here, in that there is a remedy by petition of right,

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and that, therefore, it is there a mere question as to proper form of proceeding. But that is not true in fact. We have the same remedy in substance as petition of right; that is, by petition to our sovereign or its representative, the Congress. Not as simple and effective in practice, I admit, but in theory the same. In law, the supposition cannot be indulged in that our sovereign will not do justice as speedily and promptly as any other sovereign. But if in practice this mode of proceeding is found to be unsatisfactory, that is a question which addresses itself to the discretion of Congress and not to the courts. Strong arguments may be used, as were used by Story in his Commentaries, for action upon this subject by Congress; but such arguments are for that body and not for this tribunal. Meanwhile, precisely the same reason for not permitting an ejectment suit for the recovery of lands in possession of the Crown exists for not permitting such a suit for lands in the possession of the United States, especially when in government use.

A class of cases have been cited to show that courts have taken jurisdiction in cases of this kind, and have in such cases passed upon the validity of the title. I propose to examine those to which my attention has been called, *seriatim*, and in each one, though varying from each other, we will find important differences from the case at bar.

The first one is *Meigs v. McClung*, 9 Cranch, 11. The question there was as to the construction of a treaty, whether the land in controversy was described as within the reservation of the terms of the treaty. The court say: "The question on which the cause has been placed is this, Is the land claimed by the plaintiff in the court below within the ceded territory?" The court further say: "The fact that the agents of the United States took possession of the lands lying above the mouth of the Highwassee, erected extensive improvements thereon, and placed a garrison there, cannot be admitted to give an explanation to the treaty which would contradict its plain words and obvious meaning." It will thus be seen that the question of jurisdiction was not made, was not brought to the attention of the court, and certainly was not passed upon by the court. The court expressly say what the question was upon which the cause had been placed.

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That case differed, too, from this in another very important aspect. There a *record-title* could not have been suggested, as there is in this case. The United States had no claim of title except by *contradicting* the record produced. It did not come at all within the case we have before cited from 4 Coke, 55 a, known as *The Sadler's Case*, where the court said :

At common law, when the king was seized of any estate of inheritance or freehold by any matter of record, were his title by matter of record judicial as attainder, *ministerial as by office*, or by conveyance of record as by fine-deed enrolled, etc., or *by matter of fact*, and found by office of record, on oath, as by alienation, purchase by alien, etc., he who had right was put to his petition of right, in nature of a real action, to be restored to his freehold and inheritance.

This case was one of the most prominent of leading English cases. It is cited in hundreds of English cases. It is referred to as the law in the textbooks, and is unquestioned by any authorities of our own courts. See 5 Bacon's Abr., tit. Pre.; *The Bankers*, 14 How. St. Trials, 28; *Chisholm v. State of Georgia*, 2 Dallas. We rely upon this principle as the settled law of England beyond all question, see 15 Meeson & Welsby, 106, *Attorney-General v. Hallett*, and we can conceive of no reason why it should not be so regarded here.

The next case is that of *Wilcox v. Jackson*, 13 Peters, 498. There suit was brought to recover Fort Dearborn, in Chicago, against the officer in command. The decision was in favor of the plaintiff in the State court, but upon a writ of error it was *reversed* by the Supreme Court. It is true that it was not reversed upon the ground of want of jurisdiction, but upon other errors assigned. The court does not pass upon the question of jurisdiction, nor mention it as a question made in the case. It is assumed, however, that by passing upon the law of the case it decided the question of jurisdiction.

It will be observed that the question of jurisdiction raised by us is not strictly as to the subject-matter. It is a question arising from the character of the party, and is undoubtedly one which may be waived by consent. Perhaps that consent may be implied where the point is not expressly made and insisted upon by the United States. This case was an *agreed case*. The facts

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were agreed upon, and it was further agreed that judgment should be entered according to the law of the case. So far as it appears in the statement and decision of the case in the Supreme Court, it may fairly be implied that the question of jurisdiction was waived. Certain it is that no reference whatever is made to such a question.

Again, this was in a case arising upon a writ of error to a State court, and in such a case the Supreme Court could pass only upon such questions as the record showed were within the provisions of the 25th section of the Judiciary Act. See 12 Wh. 132; 20 Wallace, 590.

The question before the court, and one upon which it took jurisdiction, was the construction and effect of acts of Congress which the appellant claimed had been improperly decided adversely to him. It is quite doubtful, at least, whether the question we are now considering could in such a case have been before the Supreme Court, whether decided rightfully or wrongfully by the State court. In *Hall v. Gaines*, 22 How. 144, where writ of error was to State court, the court say:

*To give jurisdiction to this court the party must claim for himself, and not for a third party in whose title he has no interest. Setting up a title in the United States by way of defence is not claiming a personal interest affecting the subject of litigation. . . . If it was allowed to rely upon the United States title in this instance, the right might be decided against the government when it was no party and had not been sued. See, also, 1 Black, 472; 5 Cr. 344; 10 How. 311.*

This case (*Wilcox v. Jackson*) also was one in which the United States could not have suggested a title apparent solely from the record. It depended upon facts outside of a *record-title*. The case, too, shows plainly that with regard to property the legal title to which is still in the United States, or where the question is whether such title has passed from the United States, acts of Congress are paramount to legislation by the State, notwithstanding the property is within the territorial jurisdiction of the State, and that in such case, even as between citizens, the State of Illinois could not declare that a title, inchoate and incomplete because of a patent not having issued from the United States, should

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be deemed as perfect a title if a patent had issued in opposition to an act of Congress which says that a patent is necessary to complete a title.

The case of *Brown v. Huger*, 21 How. 305, came before the Supreme Court upon a bill of exceptions from the Circuit Court of the United States for the Western District of Virginia. In the exceptions there is nothing whatever relating to the question before us here, and there is not, in the opinion of the court, the slightest reference to such a question. There was no objection of this kind made. In both courts the decision was in favor of the United States, or rather of the officers holding under the United States.

It is inferred, however, that because the Supreme Court exercised jurisdiction in a case where the fact appeared that the property was in possession of the United States, therefore it can have jurisdiction in a case like this. This inference results partly from failing to distinguish from the want of jurisdiction in regard to *subject-matter* when consent cannot give jurisdiction, and want of jurisdiction on account of the character of parties affected where consent may give jurisdiction. In the latter case, if the point is not made, consent may be implied. It was not made in the case we are now considering. The court could only hear the questions made by the bill of exceptions and assignment of errors. It is assumed that because the court passed upon these that such a decision is equivalent to an express declaration that the court below had jurisdiction. But in the *Dred Scott Case*, 19 How., it is expressly held that the Supreme Court may, in cases coming from the United States Circuit Court, pass upon the law and merits of the case when the court below had no jurisdiction whatever. Such an assumption, therefore, by no means necessarily is sustained by the fact that the court discusses the merits of the case, especially in a case where the question of jurisdiction is not raised in either court, and where the court could only pass upon questions raised by the bill of exceptions and assignment of errors. In this case, also, the United States was not in a position where it could have suggested a record-title. The question was as to the boundaries of the property described, and one which

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rested upon extrinsic facts. Any suggestion would have at once presented the very issue to be passed upon by the jury.

In the case of *Grisar v. McDowell*, 6 Wallace, 363, precisely the same observations may be made as in the case of *Brown v. Huger*, last considered. Both cases came before the Supreme Court upon *bills of exceptions* taken by the plaintiff in the court below, in none of which was any reference to the question we are considering, and it would have been not only entirely unnecessary to have alluded to this question, especially as the exceptions were not sustained and the judgment was therefore properly affirmed, but it would have been a work of supererogation, uncalled for, and improper according to the practice of the court upon a hearing of bills of exceptions, where the only question is whether *upon these* the plaintiff in error is entitled to a new trial, and the merits of the case *are not before the court*; and, according to the decision in the *Dred Scott Case*, it was proper to pass upon the questions, though the court might have thought from the facts before it that the court below would have had no jurisdiction if the question had been made. It will be remembered that the practice of the Supreme Court requires the plaintiff in error to *assign errors*, and the court will not hear argument nor pass only upon the errors assigned.

The case of *Cooley v. O'Conner*, 12 Wallace, 391, also arose upon a bill of exceptions, in which no reference was made to this question, nor did it appear among the assignment of errors, nor was the point made in any way, and of course no decision was made upon it. In that case also the United States was not in possession of the property, nor was it in government use. None of these cases are therefore any authority upon this point whatever.

There are some cases decided by State courts no doubt adversely to some of the principles we contend for here, and I will notice such as have been called to my attention. In the case of *Wilcox v. Jackson*, 13 Peters, already referred to, the court below, in 1 Scammon, 344, held that in that case a suit could be maintained in ejectment for the recovery of property in the possession of officers of the United States. The same was held in *Dreux v. Kennedy*, 12 Rob. La. R. 502, and in *Pollock v. Mansfield*, 44 Cal., in 1872.

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In regard to these, I will say, first, that they are authorities entitled to such respect as the reasoning on which they are based appears to demand. They are not binding upon this court, and are only persuasive. If they are contradicted by authorities, as they are equally entitled to respect (see *People v. Ambrecht*, 11 Abbott's Pr. N. Y. Reports and the English cases cited), then, viewed simply as authorities, they have but little weight. If the principles on which they are founded are shown to be erroneous by decisions of the Supreme Court of the United States which are binding upon this court, as we think we have shown, then these State authorities must fall.

One thing is certain, the reasoning upon which they are based throws no light upon the subject to one who has examined the subject in the light of the authorities, both English and American, heretofore cited by us. None of them show by internal evidence a thorough investigation of the subject. None of them show that a single English authority was cited or considered. They rely upon cases which we have already fully discussed, and show upon their face that they have misapprehended the full force and effect of those cases. For example, in the California case the decision is based upon the idea that, in the cases of *Meigs v. McClung*, *Wilcox v. Jackson*, and *Grisar v. McDowell*, the Supreme Court of the United States passed upon the *merits of the case*; whereas, as we have already shown, it did no such thing, but only passed upon the bill of exceptions and the assignment of errors in the cases. In *Dreux v. Kennedy* the decision was based upon the cases of *Wilcox v. Jackson* and *Osborne v. The Bank of the United States*, which we have fully considered, and certainly throws no new light upon those cases. As mere weights by force of the reasoning contained in them these authorities are not intrinsically very ponderous, and in this light only can they have influence here.

I say this without disrespect to these authorities, for all authorities which are not binding ought to be tested by this rule. The true judicial mind is controlled by reasoning rather than by authorities of other independent courts.

It may be said in regard to these cases also that in none of them could the United States have suggested, as we have here, *a title of record*. That was the very question involved on the

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merits of the case, and which could not have been *suggested*. In the Louisiana case, the United States retained only a usufructuary interest for a period depending upon the occurrence of a certain event, and the legal title was in another, which title was the subject of controversy.

I now call attention to the fact that in no case cited or which can be cited has the question we are discussing been presented to the court in the manner it is presented here. In no case has the question been presented directly by the United States; but in all of them the question, when made, has been by the *party to the suit*. Here it is raised by the United States itself, or by the attorney-general representing the United States, the real party affected by it, and who, it may be contended, is the only party having a right to make this question.

As we have before said, the want of jurisdiction claimed by us relates to the character of the party rather than to the subject-matter of the suit. It is of that nature which may be waived either by consent or possibly by implication, if it is not expressly set forth and insisted upon. For the sake of argument, though without admitting it, it may be that no one but the United States itself or its law officer in its behalf, can object to the jurisdiction of the court upon this ground. That being personal to the United States alone, an individual who is sued and over whom the court has jurisdiction has no authority to and cannot set up this prerogative in behalf of the United States.

If this be so, this of itself would be a complete answer to all the authorities which have been cited for the plaintiffs reviewed by us.

But in such case the question then arises whether the United States can, in the way it has here, effectually interpose and set up its exemption from the jurisdiction of the court without consenting to become a party to the suit, which would of itself be a waiver of the very point it appears for the purpose of making before the court.

Has the United States the right to be sued without becoming a party and without submitting to the jurisdiction of the court? As an original question, this would not be, it must be confessed, an easy question to answer. But fortunately this problem has

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been solved for us both in the English and American courts. The case of *Leigh v. Roe*, 8 Meeson & Welsby, 579, is an exact precedent for us in every particular, and justifies our course in all respects. It is not necessary for us to reason upon it. It presents a case where no analogies in cases between individuals can be of much assistance. Such a solution seems to result from the necessities of the case, for in some way the right of exemption from suit should be protected, without being destroyed in the very act of asserting it, when, unless it is done, the court is indirectly about to deprive the sovereign of the benefits of such a right or prerogative.

It was therefore held in *Florida v. Georgia*, 17 How. 478, that the attorney-general of the United States had the right to intervene in a suit between these States, and, to present the case of the United States, "to adduce evidence, written or parol, to examine witnesses and file their depositions," and to be heard upon the questions affecting the United States, *without becoming a party to the cause*; and this although the court had no jurisdiction over the United States and could render no judgment by which it would be bound. The court say :

But the court do not regard the United States in this mode of proceeding as either plaintiff or defendant; and they are therefore not liable to a judgment against them nor entitled to a judgment in their favor. But, in deciding upon the true boundary-line, we will take into consideration all the evidence which may be offered by the United States.

This authority therefore recognizes the right of the United States to present its case and assert its rights and to have them considered without submitting to the jurisdiction of the court. If this can be done for one purpose why not for another, and why not the United States assert all its rights?

That case related to property in which the United States was interested, though it had neither possession nor record title, nor was it in government use. If, without any of these, the United States had the right to appear to protect its interests without submitting to the jurisdiction of the court, how much more should it have such right when all three of these are assailed?

In view, therefore, of the principles and precedents of the

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common law as established by a series of English authorities, uncontradicted, and extending through the period of the judicial history of England; of the principles established by the Supreme Court of the United States, that the actual possession of the United States cannot be disturbed by judicial process in a suit commenced by an individual; of the fact that nearly all authorities may be reconciled with these principles and must be reconciled with them to prevent a direct conflict; that there can certainly be found no opposing authority in any case presented, as this is, by the United States itself, it is insisted that this court cannot consistently justify any further proceeding in this case, but must dismiss the cause.

The able and learned brief submitted by counsel for the plaintiff is not given, as much of it is covered by the opinion of the court, delivered as follows:

## OPINION OF THE COURT.

HUGHES, J.—The first question is whether it is competent for the government of the United States to appear by suggestion, as it has done in this cause.

Though I concede that the intervention of the government in this manner, in a cause pending between other parties, is unusual in our American practice, I do not see that for that reason it is inadmissible. It was sanctioned by the Supreme Court of the United States in the cases of *Florida v. Georgia*, 17 Howard, 478; *Maxwell's Lessee v. Levy*, 2 Dallas, 381; and *The Exchange*, 7 Cranch, 117; as well as others which might be cited. It was allowed in the case of *The Pizarro*, 10th New York Legal Observer, 97.

I believe that intervention by this method is the settled practice in England. It was, for instance, the proceeding taken by the attorney-general, in *Legh v. Rose*, 8 Meeson & Welsby, 579. On authority, therefore, I do not feel at liberty to question the right of the attorney-general to intervene by suggestion in a cause in which the government is alleged to be interested, as in this cause.

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Nor is there any validity in the objection that a new and side issue is introduced into the cause by this proceeding. It is nothing more in effect than another form of a plea to the jurisdiction. This plea always introduces a preliminary issue requiring to be dealt with before the cause can proceed upon the merits; and the present demurrer is, in effect, an issue of law joined on a plea to the jurisdiction, which is not anomalous and works no hardship.

We come, therefore, to the questions of law presented by the suggestion and demurrer. These are two:

1st. Whether the attorney-general's suggestion is of itself sufficient to defeat the jurisdiction of the court over the cause; and,

2d. Whether, supposing it has not that effect *ipso facto*, the court may look into the grounds on which that officer intervenes; in pursuance of the observation made by Chief Justice Marshall in the case of the *United States v. Peters*, 5 Cranch, 115:

It certainly can never be alleged that a mere suggestion of title in a State to property in possession of an individual must arrest the proceedings of the court and *prevent their looking into the suggestion and examining the validity of the title.*

I. I should compromise the judicial office if I were to devote any serious argument to the first of these questions.

The right of every citizen to a judicial determination of a controversy affecting his liberty or property, in which he may be involved, will not be denied at this day in this country. The courts are open to the humblest citizen, and there is no personage known to our laws, however exalted in station, who by mere suggestion to a court can close its doors against him. I have no thought that the chief law officer of the United States, who in the performance of his duty in this cause has entered the suggestion now under consideration, claims for his action any such prerogative as that in question.

But even if it were possible to conceive that such a pretension could be made, let it be answered that it is a cardinal tenet of the Constitution that the judiciary are an independent branch of

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the government, not to be controlled in its dispensations of justice by interference from other departments, and not only empowered but bound to administer the right without fear, favor, or affection. It is useless to dwell upon these topics, but it is appropriate to recall what has been said by luminous jurists of a former era in regard to the decision of questions arising between citizens and their government. In book 2, chap. 14, § 213, Vattel has these sentences :

If any difficulties arise (on questions of contract and title between the sovereign and private persons) it is equally conformable to the rules of decorum, to that delicacy of sentiment which ought to be particularly conspicuous in a sovereign, and to the love of justice, to cause them to be decided by the tribunals of the state. And this indeed is the practice of all civilized states which are governed by settled laws.

In the same spirit were the utterances of Mr. Selden, one of England's most illustrious scholars and lawyers in the time of the first Charles :

In all cases, my lords, when any right or liberty belongs to the subject by any positive law, written or unwritten, if there were not also a remedy by law for the enjoying or regaining the right or liberty where it is violated or taken from him, the positive law were most vain and to no purpose ; and it were to no purpose for any man to have any right in any land or other inheritance if there were not a known remedy, that is, an action or writ by which in some court of ordinary justice he might recover it. And in this case of right or liberty of person, if there is not a remedy in the law for regaining it when it is restrained, it were of no purpose to speak of laws that ordain it should not be restrained. 3 Howell's State Trials, 95.

If the hereditament of an English subject could be taken and held by the king without question in the courts, the notable words which the elder Pitt pointed at George III, would have had no truth or meaning :

The poorest man may, in his cottage, bid defiance to all the force of the Crown. It may be frail ; its roof may shake ; the wind may blow through it ; the storms may enter ; the rain may enter ; but the King of England cannot enter ; all his forces dare not cross the threshold of the ruined tenement. Speech on the Excise Act.

If there could be no judicial inquiry into the government's pos-

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session of property claimed by the citizen, what could be said of the clause in the Fifth Amendment to the Constitution forbidding that private property shall be taken for public use without just compensation, except that it was a meaningless form of empty words, a delusive safeguard against public wrong, a deceptive guarantee of private rights.

The only alternative which would be left to the plaintiff, if this suggestion should prevail as confessed by counsel for the government, would be what Mr. Justice Grier once characterized as "the hopeless remedy of a petition to Congress." The effect would be to defeat a judicial adjudication of the rights of parties and refer the plaintiff's claims for political determination to a political tribunal. If the fact be as implied by the suggestion, that there is no method known to the judicature of the country by which the rights of parties to this action could be judicially determined, it would be a reproach to American jurisprudence. In every sense would the result in this cause be unfortunate. So much of sentiment, so much of sectional sentiment invests this estate of Arlington, at once the burial-ground of soldiers who lost their lives for the Union and the patrimony of the Lees, that it were in the highest degree desirable that its title should have a judicial determination rather than be relegated to the debate and vote of a popular assembly, always more or less liable to the influences of partisan passion. It would, therefore, be somewhat excusable in the court if it should apparently, in its consideration of the suggestion of the government, lean in favor of retaining its jurisdiction of such a cause as that at bar.

II. I come now to look into the grounds on which the attorney-general, through counsel here, claims that the court should stay its action and dismiss the cause.

It is conceded on all hands that the sovereign power in this country, whether it be a State or the United States, cannot be made a direct party defendant in any action, except by its own consent, given generally by statute, or specially by its authorized law officer.

And the question here is, whether it can be made so indirectly; and, in the present instance, whether the United States can be made so indirectly in an action brought against defendants who

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are the occupants of lands which it claims to own. Conceding under protest that the law may be against them on this broad proposition, counsel for the government themselves narrow this latter question, and say that even though a suit may be brought indirectly against the United States, yet that it cannot be where the proceeding takes the form of an action of ejectment, brought against defendants who are occupants of lands which the government claims by *prima facie* title of record, of which it is in actual possession by its officers, and which it claims to be actually using for public purposes. Such is the exact pretension made in this cause by the government.

On the part of the plaintiff it is contended that the government does not hold the Arlington Estate as a sovereign, for the reason that the jurisdiction of Virginia over it has never been surrendered; but that it holds it only in a corporate capacity, by the same tenure as, and with no other prerogative than that by which a private corporation or citizen would hold the land in Virginia.

I am not sure that the inquiry is material; but, in deference to the views of counsel, I will consider these respective pretensions in the light of the facts of the record. How does the government hold this property? By whom and for what public purposes? And does it hold it in its sovereign or corporate capacity?

The estate consists of eleven hundred acres. Less than a fourth of it—two hundred acres—is set apart as a national cemetery. This parcel is undeniably occupied by an officer of the government, and used for a necessary public purpose—a purpose, indeed, which no individual in the land would be willing to see defeated.

The rest of the land, nine hundred acres, is occupied by some two hundred people, whom I judge from the record to be poor people, as every one but two or three signs his name with an attested cross-mark.

Of all the occupants of this nine hundred acres, only one (R. P. Strong) is shown to be an officer of the government. They are mostly tenants of the government, but paying no rent. The record shows that this land was not, until as late as 1872, “set

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apart and held as a military post and reserve connected therewith," and directed to be "considered a military reservation pertaining to Fort Whipple." For this land the government seems to have so little use, that it allows it to be occupied for their own purposes, probably in mere charity, by nearly two hundred people in the humblest walks of life.

Is it in fact a military reservation connected with a military post? Can it be more than "considered" so? A military post is a place at which troops are posted or intended to be posted, and without the troops, or the probability or the intention of troops being posted on it, a tract of ground cannot be a military post. Laying out the plan of a city in a forest, and calling it a city, does not make it so; it remains a forest still. In the theoretical sense only is Fort Whipple a military post, and the lands around it a military reservation. The surface of Virginia is studded over with such "forts," and the only happy thought connected with them is, that they are forts no longer. It is so in fact with Fort Whipple, and it is a painful anachronism now to "consider" it as still a fort. Yet, the name Fort Whipple implies that it was intended as a missionary, rather than a military post.

Not only is the land thus set apart and directed to be considered a military reservation, almost wholly occupied by persons who are not agents or officers of the government, but the government has shown in another way how little real bona fide use it has for it. I consider that I may allude to the acts of Congress as part of this record, for the judicial mind dwells in the laws of the country, and that of the Federal courts in the statutes of Congress, from which they derive all their jurisdiction. The action of these courts is wholly based on the statutes, so that the record of such a court is a palimpsest originally inscribed with the statute law of the subject, overwritten with the proceeding in the particular case. In 14 Statutes at Large, 589, is an act of Congress within the judicial cognizance of the court, releasing about eighteen acres of this land to Maria C. Syphax without consideration.

Of course it cannot be contended that either this parcel, or the eight hundred and eighty-two acres which is directed to be con-

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sidered as a military reservation, is in any but the nominal use of the government.

Justice is figuratively thought to be blindfold; but it cannot be supposed that a court of justice sitting in Alexandria, in full view of this reservation, can by any reasonable fiction (the matter entering as an element in a question which it is called upon to decide) regard this military post, called Fort Whipple, as really occupied by the government for a military purpose. But there is what seems to me conclusive evidence that the government is not treating or using this reservation as a permanent acquisition of land for any purpose. Section 355 of the Revised Statutes forbids the acquisition of real estate by the government for any permanent military purpose until a perfect legal title and cession of State jurisdiction shall first have been obtained. All reservations of military lands in the Western States are for a more or less temporary purpose. The term military reservation has come to be synonymous in that part of the Union with temporary reservation for military purposes. The requirements of section 355 are, I believe, never complied with in regard to those reservations, because they are deemed temporary properties of the government, temporarily used, and they are reserved from public domain acquired by the government by treaty, as a sovereign power. The requirements of that section have not been complied with in regard to the parcel in question of the Arlington Estate embodying eight hundred and eighty-two acres. It is not now occupied by troops, and the fact that the requirements of section 355 have not been obeyed, nor the authority conferred on the President by section 1838, himself to obtain from the State a cession to the United States of its jurisdiction, has not been exercised, seems to prove that the government has and has had no real intention of occupying that property with troops.

I therefore conclude that nine hundred acres of the Arlington Estate are not in actual bona fide government use, and that the only practical uses to which it is devoted in fact are those enjoyed and exercised by the two hundred poor people who live on the premises gratuitously.

I am not aware of any express law, and I doubt if there be any law, authorizing any officer of the army of the United States in a

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time of peace to "set apart as a military post and reserve in connection therewith," to be "considered as a military reservation," any considerable tract of land in the old thirteen States, where there are no "public lands," and where the government has no actually used military post, without a previous compliance with the requirement of section 355.

In respect to this nine hundred acres, I think the pretension of the counsel for the government is unfounded, either that it is occupied by officers or agents of the government; or that it is actually used by the government for any but nominal government purposes; or that the government has title in it in its sovereign capacity; even though it should be found to have such title in its merely corporate character.

In the foregoing inquiry I have unavoidably, to some extent, overstepped the showing of the record, but I have gone into an examination of the uses made by the government of this property, more in deference to the estimate of the importance of the matter expressed by counsel for the government, than from any opinion of my own that it can affect the decision of the cause. It will be seen in the end that the principles of law governing this decision apply as conclusively to the smaller portion of the estate, embracing the cemetery, as to the larger portion of the estate occupied by its miscellaneous throng of defendants.

I return to the parcel of two hundred acres set off as a national cemetery; and I cannot but regret that the title of property so hallowed in the minds of patriotic people as that now under contemplation should have been left in such doubt as to fall under the cold, inexorable scrutiny of a court of law. If sections 4870, '71, and '72 of the Revised Statutes be examined, it will be found that they contain specific directions as to the manner in which an exclusive title in the United States in lands intended as cemeteries shall be obtained, and the exclusive jurisdiction of the United States over them shall be secured. Their provisions have not been availed of in respect to the Arlington cemetery. Nor has the requirement of section 355 been complied with, nor the authority conferred by section 1838 exercised. The title in this property is held by the United States merely as if it were an ordinary purchaser without the authority of a sovereign over it, or

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the prerogatives of a sovereign to protect it. The case of the cemetery tract differs from that of the reservation not at all in regard to the legal or political title, and only in the fact that it is actually used for a necessary, I will add sacred, public purpose.

In regard to the whole Arlington Estate, the title of the United States is in the condition alluded to by the chief law officer of the government, in vol. 14, Opinions of the Attorney-Generals, 200, in a letter written to the secretary of the treasury, instructing him in these words :

In regard to lands owned by the United States, within the limits of a State over which the State has not parted with its jurisdiction, the United States stand in the relation of a proprietor, and the local officers have, in my opinion, the same right to enter upon such land, or into the buildings located there, and seize the personal property of individuals for non-payment of taxes thereon, as they have to enter upon the land or into the buildings of any other proprietor for the said purpose, it being understood in the former case that the right must be so exercised as not to interfere with the operations of the general government.

The tenure by which the United States holds the Arlington Estate is described by Vattel in a passage quoted by counsel of the government, wherein that writer says :

What is called the high domain, which is nothing but the domain of the body of the nation or of the sovereign who represents it, is everywhere considered as inseparable from the sovereignty. The useful domain, or the domain confined to the rights that may belong to an individual in the state, may be separated from the sovereignty, and nothing prevents the possibility of its belonging to a nation in places that are not under her jurisdiction. Thus may sovereigns have fiefs and other possessions in the territories of another prince. In these cases they possess them in the manner of private individuals.

It was said by Judge Story, in the *United States v. Cornell*, 2 Mason's Rep. 63 :

Although the United States may well purchase and hold lands for public purposes, within the territorial limits of a State, this does not of itself oust the jurisdiction of sovereignty of such State over the land so purchased. It remains until the State has relinquished its authority over the land, either expressly or by necessary implication.

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In *Commonwealth v. Young*, Bright. Pa. Rep. 302, it was held that

The Constitution of the United States prescribes the only mode by which they can acquire land as a sovereign power, and therefore they hold only as an individual, when they obtain it in any other way.

To the same effect is the decision in the case of *The People v. Godfrey*, 17 Johns. Rep. 225.

In *Renner v. Bennett*, 21 Ohio, 431, decided in 1871, it was held that where the United States, without the consent of the State, purchases and uses land for any of the purposes specified in section 8, article 1, of the Federal Constitution, it acquires no jurisdiction over the land.

In the cases of *Commonwealth v. Young*, it was held that the sale, by public outcry, of lands of the United States over which the State jurisdiction had not been ceded, in violation of a State law requiring that lands should be so sold by an auctioneer commissioned by the governor, was invalid.

It seems clear to me that the government holds the Arlington Estate by private and not by sovereign tenure, and that it is holding only two hundred acres of it by an officer for a necessary public purpose. Therefore I think that the pretension of counsel for the government, that it holds the whole estate for actual public purposes by the hands of its officers, and by sovereign tenure, is quite inadmissible. The government acquired the land under authority of a loose law passed in 1863, when the times were much out of joint; but it does not hold it in observance of and compliance with the requirements of any law upon the statute-book prescribing the manner in which its title to and authority over the lands shall be secured and perfected.

I come now to consider the question whether the government can be sued indirectly in the manner in which it is sued in this action for real property held as just described.

I have brought to the investigation of this question an earnest solicitude to decide it aright, because, as must be known to every lawyer, on its decision the title of the government to Arlington, in all probability, depends. There stands in the background of

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this suggestion and demurrer the fact that the tax titles derived by purchasers at the tax sales made by Commissioners Hawxhurst, Watson and Foster have been overthrown and held void by the Supreme Court of the United States in the two cases of *Bennett v. Hunter*, 9 Wallace, 326, and *Tacey v. Irwin*, 18 Wallace, 549. Under these decisions as many as eighteen or twenty actions of ejectment have passed under the supervision of this court, in proceedings to which the defendants have not thought it worth while to make contest. An instance of one of these cases may be found in *Lee v. Chase*, 1 Hughes, 403.

Since the decision in *Tacey v. Irwin* no holder of land acquired from Hawxhurst, Watson and Foster has made defence until now; and it is known to the bar that there can no defence be made in this case except the one now under consideration, to wit, that the government is not amenable to suit in the indirect form employed in this action.

The commissioners who have been named adopted a rule not to receive the taxes due on property advertised for sale unless tendered by the owner in person. This rule was so rigidly enforced that neither friend, relation, nor agent was allowed to pay taxes due for the absent owner; their application to pay and save the property from sale being uniformly refused by the commissioners under the operation of the rule in question.

In *Bennett v. Hunter* it was insisted, in support of the tax deed, that the right to pay the tax before sale was limited to the owner in person, and could not be exercised by the tenant in possession, who had offered to pay it. This position was not sustained by the court, which held that the payment of the tax which the act requires to be made by the owner need not necessarily be made by him in person. It held that it was enough if it be made by any person for him; and this on the ground that an act done by one for the benefit of another is valid, if ratified either expressly or by implication, and that such ratification will be presumed in furtherance of justice, and the court held the tax sale to be void.

In *Tacey v. Irwin*, where there had been no tender of the tax by the owner or other person, the court said:

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It is difficult to see how, upon the case as found here, the sale can be sustained. The law does not require the doing of a nugatory act, as would have been a formal tender of payment, after the action of the commissioners declining to receive the taxes from any person in behalf of the owner. *Bennett v. Hunter* decides that the owner has the right to pay either in person or through any one not disavowed by him who was willing to act for him. This right the commissioners, by the rule which they established and the uniform practice under it, effectually denied. The friends and agents of absent owners were informed that it was useless to interpose in their behalf, and unless the owner appeared in person and discharged the tax the property would be sold.

This was equivalent to saying that a regular tender by any other person would be refused. While the law gave the owner the privilege of paying by the hands of another, the commissioners confined the privilege to a payment by the owner himself. This was wrong, and a denial of the opportunity to pay accorded to the owner by the act; and the lands were therefore not delinquent when they were sold.

If an offer in a particular case, to pay the tax before sale, and refused by the commissioners because not made by the owner in person, rendered a subsequent sale by the commissioners void, surely a general rule announced by the commissioners that in all cases such an offer would be refused must produce the same effect.

Such a rule of necessity dispenses with a regular tender in any case. In the absence of any proof to the contrary, it is a legal presumption that the tax in this case, though not actually offered, would have been offered and paid before sale but for the known refusal of the commissioners to accept any offer when not made by the owner in person.

If so, the commissioners were not authorized to make the sale in controversy, and the judgment must be affirmed. -

It is plain, therefore, in the light of these decisions of the Supreme Court of the United States, that the tenure of the government in the Arlington Estate depends upon the success of its present endeavor to defeat a judicial trial of this cause upon its merits; and there can be no doubt but that the attorney-general was bound under the impulsion of a supreme duty to intervene by suggestion to test the jurisdiction of the court.

The pivotal question on which the government's title to Arlington must stand or fall is therefore the one which I am now to consider. Can the government be indirectly sued in this action?

This suit is brought under the laws of Virginia. See Code of 1873, ch. 131, pp. 958 to 963. It is a statutory action of eject-

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ment. The ejectment law of Virginia is a copy of that of New York. Under it the action of ejectment may be brought to try the right of possession, serving thereby the purpose of the English action of *ejectio firmæ*; and it may be brought to try the right of property, thereby standing in lieu of the English writ of right. The law of Virginia provides expressly that this statutory action of ejectment may be brought in the same cases in which the writ of right could before be brought.

The present action is brought in a case in which the old English action of ejectment would not lie. It is brought by a remainderman after the termination of the life estate, where there was *disseisin* of the life tenant during the life estate. The right of entry had been lost, and the right of entry was necessary to the old action of ejectment. Under the statutory action given by the Virginia law no entry is necessary. None was necessary in these suits, process having been served by mere notice, and therefore there could not, in respect to these lands claimed by the government, be, as in England, either in fact or fiction an intrusion or possible collision with the king's officers by entry.

In all these respects it differs materially from the English action of ejectment of Blackstone's day; and counsel for the government is mistaken in supposing with Tidd and Runnington that even the English ejectment was an action *in rem*, requiring seizure of property on *mesne* process. The English action of ejectment did not lie for one who had, like the plaintiff in this case, lost the right of entry. The right of entry was necessary to it, and entry, actual or theoretical, was the proper step for commencing it; but there was no seizure *in limine* as in actions *in rem*.

The action of ejectment in England was,

1st. In its origin a mere personal action for damages.

2d. By degrees it became a mixed action to recover damages and estates for years.

3d. When it had begun to be used for the recovery of freehold estates it became a real action; for our ancestors in their high regard for freehold estates were not willing to divert the mind of the jury from the complicated questions of title to the consideration of the infinitely less important matter of damages. Thus

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ejectment was certainly in its origin no proceeding *in rem*; in its subsequent use it could no more be called a proceeding *in rem* than any other real action, and it would now be no less absurd to consider it as such than it would be to take that view of *detinue* brought to recover a specific horse, or *debt* to recover a specific sum of money. 2 Brown's C. and A. Law, 111; *Perceival v. Hickey*, 13 Johnson, 257; 2 Kent, 378; 4 Minors' Institute, 79 [lithograph].

It was for the reason that the English action of ejectment required entry and disseisin as a means of commencing it, either actual or theoretical, that it did not lie against lands of the king; for it could not be commenced without *intrusion* upon the king's possession. But the present action, as before said, though bearing the name of ejectment, is in effect equivalent to a writ of right, not requiring to be commenced by entry and disseisin, either in fact or fiction. The law of the local sovereignty in which this land lies gives to the citizen this right to try his right of property in lands by a proceeding which disturbs the possession and offends the dignity of no claimant whatever. It authorizes a suit to be instituted to try the title, by peaceful notice given to the actual occupants of the land, and leaves it entirely in the volition of the claimant, whoever he be, to appear or not as defendant in the suit. Section 5 of the law provides in terms that "if a lessee be made a defendant at the suit of a party claiming against the title of his landlord, such landlord may appear and be made a defendant with or in the place of the lessee," if he chooses. Thus, in case the landlord be the government, the action may not only be commenced, but prosecuted to judgment, without any disturbance of the possession of the government, or "interference with its operations," or even service of mandatory process upon its officers. The action may be brought against the State of Virginia.

STATE OF THE LAW IN RESPECT TO SUITS FOR PERSONAL  
PROPERTY.

But first, I will review those decisions which relate to personal property where it has been the subject of suit, or has been directly

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sued for, in proceedings to which the government of a State or of the United States was not directly, but was indirectly, defendant to the action.

First, as to the leading case, *The Siren*, 7 Wallace, 152. The steamer *Siren* was captured in the harbor of Charleston by a naval vessel of the United States while in the act of violating the blockade of that port, and was lawfully a prize under the law of nations. She was brought into the port of Boston, and while on her way there committed a maritime tort by running into and sinking another vessel. Being lawful prize and property of the United States, she was libelled by the government merely to obtain a judicial verification and certification of its title, and for a sale on its account, pursuant to certain provisions of law. While in the custody of the court, the owner of the sunken vessel intervened by petition, asserting a claim upon the *Siren* and the proceeds of her sale, for the damages he had sustained. The District Court refused to grant the prayer of the petition on the ground that the *Siren* and the proceeds of her sale, being the property of the United States, were exempt from legal process at the suit of the intervenor, because, to allow the intervention would be to allow the citizen to implead the government. But the Supreme Court of the United States reversed the District Court and allowed the damages for the maritime tort claimed by the petitioner. The court stated, p. 159, that the fact that the government was exempt from a direct proceeding *in rem* against the vessel while in its custody, was no ground for holding that it was exempt from the indirect proceeding. Yet this case is cited by counsel for the government in support of their proposition that the government cannot be sued indirectly; and I understood the district attorney to express a willingness to stake the fortunes of his cause in the present suit upon that decision. His confidence resulted from relying upon expressions of the court, detached from the context, rather than upon the principle decided; for it is true, as the district attorney recited, that Mr. Justice Field, who delivered the judgment of the court, did make use, in the course of his decision, of this expression: "As justly observed by the learned (district) judge who tried this case, there is no distinction between suits against the government directly and suits against

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its property"—an expression the judicial import of which will appear in the sequel.

## THE NATURE OF PROCEEDINGS IN REM.

Before going further in this line of inquiry, let me examine the nature of an admiralty proceeding. Any one having a claim by maritime contract against a vessel afloat may file a libel (a little book) in a maritime court within whose jurisdiction the vessel may be, setting out his claim, and praying her arrest. Thereupon issues process *in rem*; that is, *against the thing*, the vessel by her name: the Mayflower, for instance; which is seized and brought into the custody of the court, whereupon the owner of the vessel is allowed a day to answer. The *res* or vessel being thus in judicial custody, all other persons having claims against it by maritime contract are allowed to come in, by libel or petition, and submit them to the judgment of the court. And, by our law, under the forty-third rule in admiralty, any person who may have an interest in the proceeds of the sale of the seized vessel, whether by maritime or other contract, may come in with like purpose. Thus it is apparent that a proceeding in admiralty presents the scene of a group of suits; of suits *in rem*, suits against the thing, the vessel; in which the owner is indirectly defendant, and the several libellants and petitioners are independent and distinct actors or plaintiffs. Accordingly, if the government of the United States be the owner of the libelled vessel, as it was in the case of *The Siren*, the government is indirectly sued, not only by one plaintiff, but possibly by half a dozen plaintiffs.

In *The Siren* Case it had been decided below by the United States District Court that there could be no intervention by petition or libel against property belonging to the government; but, as before stated, it was there held by the Supreme Court, that such suit would lie; and decree was given in favor of the claimant for damages sustained by the collision.

It will not do, therefore, from that decision, where the government was sued indirectly, and where its property was the direct subject of judicial proceeding, to quote any expression employed

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by the court as authority against the very jurisdiction which the court was in the act of exercising.

Previously to this case, that is to say in 1865, had been decided, the leading case of *The Light-Boats* by the Supreme Court of Massachusetts, 11 Allen, 157. That was, of course, not an admiralty suit. It was a statutory proceeding very similar in character to an admiralty suit, taken to enforce by attachment *in rem* a mechanics' lien given by the State law. Certain boats intended to be used for floating lights on the Potomac during the civil war had been built for the United States at New Bedford, Mass., by contract; the contractor had received the price, and they had been delivered to the government, and were in the custody of the officers of the United States, with crew and provisions on board, awaiting their armament, but they were still at the builder's wharf. It was while thus conditioned, and in custody of the government, that they were seized on attachment by a State officer.

The petition alleged that the United States were the owners of the vessels, and prayed that notice should issue to the United States "that they appear and answer thereto." The vessels were the lawful property of the United States; had been fully paid for, and were in their actual custody by voluntary delivery.

After an exhaustive review of all then existing authorities on the subject, the Supreme Court of Massachusetts held that "after the vessels had once come into the possession of the United States, for public purposes, they were subject to the exclusive control of the executive government of the United States, and could not be interfered with by State process," and that the attachment of them was illegal and void.

But the court prefaced this judgment with the following remarks :

The petitioners suffered the title to pass into the possession of the United States, before they took one step in the State courts to establish their lien. If they had filed their petitions and attached the vessels before they came into the possession of the United States, *they might well have contended* that the court of the commonwealth had acquired a jurisdiction of the case, which could not be divested until the object of the suit was accomplished. This process does not wait for final adjudication of the rights of the parties before it takes the

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property out of the hands of its owner and possessor; but assumes the custody at the very first stage of the proceedings.

This latter language was used by the court after having stated • that the contractor had been paid by the government, by instal-<sup>1</sup>ments, the contract price of the vessels, as the work progressed, and had been fully paid before the attachment had been levied. The language which it employed was used, therefore, in respect to property wholly owned by the government.

The result of this decision is, that though government property may be seized under *mesne* process of the court before it comes into the government's custody, yet it cannot afterwards be thus dealt with when the process of the court originating the suit would wrest the property from the possession of the government's officers.

To the same effect was the decision of Judge Shipman in the case of the steam propeller *Thomas A. Scott*, 10 English Law Times (N. S.), 7261, a public armed vessel libelled during the war.

There are many cases in which it has been held that libels in admiralty, or attachments *in rem* on *mesne* process will not lie against property owned by the government, and we are driven to ascertain the principle which discriminates cases in which such proceeding will lie, from those in which it will not lie. That principle is distinctly set forth in the case of the schooner *Davis*, 10 Wallace, 20; a case which is the more important from the fact that the opinion of the Supreme Court was delivered by Mr. Justice Miller; from its having been rendered on appeal from a decree of Mr. District Judge Shipman, who, I believe, had never before been reversed; and from its having been rendered after the decision of the Supreme Court of Massachusetts in the leading case of *The Light-Boats*, to which I have already alluded.

Let it be borne in mind that a proceeding *in rem* in admiralty courts, or by attachment in other courts, is commenced by the seizure of property into the custody of the court, and that execution is virtually had on *mesne* process, at the beginning of the suit.

The principle decided in the case of *The Davis* was this: that an admiralty court may enforce a lien in a proceeding *in rem*

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against the personal property of the United States in any case where the marshal, in executing *mesne* process, does not interfere with any officer or agent of the United States; does not destroy the possession of the United States; does not, by putting the government out of possession, reduce it to the necessity of becoming plaintiff or actor in court to assert its claim to the property.

The government had shipped, in 1865, a quantity of cotton from Savannah to its agent in New York, on the schooner Davis. During its voyage the vessel and its cargo fell into the perils of the sea, and were saved from destruction by salvors; so that, afterwards, she came safely into her port of destination. The cotton (as well as the vessel) was at once regularly libelled by the salvors, as is usual in such cases, and was seized by the marshal of the court, of course, on *mesne* process.

It was objected in the Admiralty Court that this was, in fact, a proceeding indirectly against government, the cotton being confessedly the property of the government. Mr. District Judge Shipman held, in the Admiralty Court, that the master of the schooner was, as to the cotton, the agent of the government; that the marshal's seizure of it was a dispossession of the government; and that, therefore, the libel could not lie as to the cotton. But the Supreme Court of the United States held otherwise. It held that the master of the schooner was a *common* carrier, and not a mere agent of the government, and that seizure of cotton while in his custody was not a dispossession of the government. It held that, though this was an indirect suit against the government, yet the court might properly proceed to adjudicate upon the lien of the salvors, and to decree out of the proceeds of the sale of the vessel the amount due to them. Mr. Justice Miller, in delivering the opinion of the court, makes the following observations, in which it will be seen that he explains the sentence which we have quoted from the decision in the case of *The Siren*. He says:

Perhaps the two most authoritative and well-considered cases on this subject are *The Siren*, and *Briggs v. The Light-Boats*. Both of these decisions assert the doctrine, after full review of the authorities, that such a lien cannot be enforced where; in order to do this successfully, it is necessary to bring suit against the United States, because the doctrine is well established that no suit can be sustained

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in which the United States is made an original defendant, to be brought into court by process, without some act of Congress expressly authorizing it to be done. They also both assert the proposition that no suit *in rem* can be maintained against the property of the United States when it would be necessary to take such property out of the possession of the government by any writ or process of the court.

There are some expressions in the opinion of this court in the case of *The Siren* which seem to imply that no suit *in rem* can be instituted against the property of the United States under any circumstances. But a critical examination of the case and the reasoning of the court will show that that question was not involved in the suit, and that it was not intended to assert such a proposition without qualification. . . . The learned judge who delivered the opinion cites with approval the case of *The Light-Boats*, 11 Allen, in which the doctrine is laid down, and well supported, that proceedings *in rem* to enforce a lien against property of the United States are only forbidden in cases where, in order to sustain the proceeding, the possession of the United States must be invaded under process of the court. With the principle as thus stated we agree, and do not see in it anything inconsistent with the case of *The Siren*.

We have here a clear elimination of the principle of which we are in search. The learned judge did not qualify his language by confining his meaning to *mesne* process, but he was speaking of admiralty process, which is commenced by seizure of the *res*, and could have meant no other than *mesne* process.

The cases of *The Light-Boats* and of *The Davis* have the greater significance because they carry the liberty of indirectly suing the government farther than does the Admiralty Court of England. Without going into a review of the English cases of this class, I will state the result of such a review in the language employed by Judge Shipman in the case of *The Davis* (when it was before him), that in no case has the English Court of Admiralty attempted to deal adversely with the public property of the sovereign, except where there has been a voluntary appearance on its behalf, and submission of the case to the judgment of the court. Yet it is to be observed that England is notable for the absolute and unquestioning deference and subjection to law which characterizes her people and public officers in every department of society; and that the officers of the admiralty would not dare so to outrage public sentiment as to refuse to submit a right or claim of the government to the judgment of a proper court.

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I will now pass from the review of those suits concerning personal property, which are commenced by a seizure of the *res* in contest, to those which are commenced by service of the ordinary mandatory process of the courts.

The leading case in this class is the great one of *Osborne v. The Bank of the United States*, 9 Wheaton, 735. We have to do with this case only in its relation to the question whether a sovereign power may be indirectly sued.

A State tax of some \$100,000 had been assessed under a law of Ohio upon the branches of the Bank of the United States doing business in Ohio. A bill of injunction was filed in the Circuit Court of the United States, in apprehension of a levy for the tax, praying that the auditor of the State, Osborne, might be enjoined from demanding or recovering the amount of the tax. The order of injunction was granted and served on one J. L. Harper, a State collector, "while on his way to Columbus with the money and funds on which the injunction was intended to operate;" and on Osborne, before Harper reached Columbus. The amount in the hands of Harper was \$98,000. This money was delivered by Harper to the State treasurer, and by him entered on his books to the credit of the State. Its identity was preserved by its being placed in a separate package. It went afterwards into the custody of a committee of the State Legislature, and was by it returned into the State treasury, where it remained during the pendency of the suit.

Here was property claimed by the State as collected under its tax law, in the custody of its collector at the commencement of the suit, and in its possession as its own, by *prima facie* title, by deposit in its treasury standing to its credit on its treasury books.

The suit was brought against Osborne, the auditor, and amended to embrace Harper, the collector, and Curry, the Treasurer. It would not be possible to find a case where a State could be more positively sued in indirect form than was the State of Ohio in this case. It was only in the single particular that the State was not by name a party to the record that she was not sued.

The Supreme Court ruled that this suit thus brought and

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maintained was one in which the United States court had jurisdiction. In an earnest and elaborate opinion Chief Justice Marshall spoke as follows :

In a case where a State is a party on the record, the question of jurisdiction is decided by inspection. If jurisdiction depend not on this plain fact, but on the interest of the State, what rule has the Constitution given by which this interest is to be measured? If no rule be given, it is to be settled by the court? If so, the curious anomaly is presented of a court examining the whole testimony of a cause, inquiring into and deciding on the extent of a State's interest, without having a right to exercise any jurisdiction in the case. Can this inquiry be made without the existence of jurisdiction?

The judicial power of the Union is also extended to controversies between citizens of different States ; and it has been decided that the character of the parties must be shown on the record. Does this provision depend on the character of those whose interest is litigated, or of those who are parties in the record? In a suit, for example, brought by or against an executor, the creditors or legatees of his testator are the persons really concerned in interest, but it has never been suspected that if the executor be a resident of another State, the jurisdiction of the Federal courts could be ousted by the fact that the creditors or legatees were citizens of the same State with the opposite party. The universally received construction in this case is that jurisdiction is neither given nor ousted by the relative situation of the parties concerned in interest, but by the relative situation of the parties named on the record. Why is this construction universal? No case can be imagined in which the existence of an interest out of the party on the record is more unequivocal than in that which has been just stated. Why, then, is it universally admitted that this interest in no manner affects the jurisdiction of the court? The plain and obvious answer is because the jurisdiction of the court depends, not upon this interest, but upon the actual party on the record.

In *United States Bank v. Planters' Bank*, 9 Wheaton, 904, where a State was shareholder in the bank, and was indirectly a party defendant, Chief Justice Marshall said it was "a sound principle that where a government becomes a partner in any trading company, it divests itself, so far as concerns the transactions of that company, of its sovereign character, and takes that of a private citizen;" and in *Briscoe v. Bank of the Commonwealth*, 11 Peters, 257, where the State of Kentucky was the exclusive stockholder of a bank, and was the exclusive party sued, though sued nominally as a corporation, Mr. Justice McLean held that the State imparted none of its elements of sovereignty to

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the bank in creating it, and that the funds and property of the bank might be reached by the legal or equitable process of a court of justice.

In *Davis v. Gray*, 16 Wallace, 203, which was a Texas railroad case, the court said (Mr. Justice Swayne):

In deciding who are parties to the suit, the court will not look beyond the record. Making a State officer a party does not make the State a party, although her law may have prompted his action, and the State may stand behind him as the real party in interest.

The case of *Swasey v. North Carolina Railroad Company*, 1 Hughes, 17, was one of the same character. There certain property of the State, in the form of railroad shares, was the subject of litigation, and I shall let Chief Justice Waite, who rendered the decision, state the objection to it and his answer:

It is insisted by the defendant that the State of North Carolina is in fact a party defendant, and consequently that this court cannot entertain jurisdiction of the cause.

The State, although directly interested in the subject-matter of the litigation, is not a party to the record. The Eleventh Amendment to the Constitution of the United States provides that no suit can be prosecuted in this court against a State by the citizens of another State, or by citizens or subjects of a foreign State. It has long been held, however, that this amendment applies only to suits in which a State is party to the record, and not those in which it has an interest merely.

It is next urged that if the State is not actually a party to the suit, it is a necessary party in whose absence the cause cannot proceed, and that as a State cannot be brought into court, no relief should be granted upon the case made.

If the State could be brought into court, it undoubtedly should be made a party before a decree is rendered, but since the case of *Osborne v. The Bank of the United States*, 9 Wheaton, 738, it has been the uniform practice of the courts of the United States to take jurisdiction of causes affecting the property of a State in the hands of its agents, without making the State a party, where the property or the agent is within the jurisdiction. In such cases the courts act through the instrumentality of the property or the agent. The real question, therefore, to be determined is, whether the court has jurisdiction of the property which it is sought to charge, or of the agent having it in possession.

I will here point out the fact, that the court maintained its jurisdiction in, and heard and determined each of the suits of, *Osborne v. United States Bank* and *Swasey v. North Carolina Railroad Company* (to say nothing of the intermediate suits) notwithstanding that the effect of final process of execution would

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be, in one case, to invade the treasury of a State and to take from the hands of its officer property (money) claimed by the State as public property, and in the other case to invade the office of a corporation acting as agent of the State, for the purpose of a compulsory transfer and sale of the State's shares in its capital stock. I point out the fact in this place only for the purpose of showing *passim* that the "process" contemplated by Mr. Justice Miller, in his opinion in the case of *The Davis*, was only *mesne* process.

And now I deduce this principle as the teaching of the leading cases which have just been reviewed, viz. : That government may be sued indirectly in regard to personal property in actions not attended by a seizure of the property out of its officers' possession on *mesne* process, even though, in executing judgment on final process, such seizure and dispossession would result.

If a court of justice, after a full hearing, decides that personal property, claimed by government by title on which it has judicially passed, belongs to another, it will not presume that government will fail to deliver it to the rightful owner; and it is believed that in this country, as in England, final process for restitution would never be necessary. At all events a court will not be deterred from adjudicating such a cause by the presumption that the government will not make restitution without the indecent interposition of the court's writ of execution.

But suits to test the title to property manifestly differ from those brought to recover a pecuniary debt, and it is conceded that no court but the Court of Claims has jurisdiction to render what Mr. Justice Miller calls "a moneyed judgment" against the United States. *Case v. Terrill*, 11 Wallace, 199. Counsel for the government speak of the impatience with which the Supreme Court expressed itself, of the decree which the court below (the United States Circuit Court for Louisiana) had rendered against the United States in this last case. The cause of the judicial impatience was that a court should have rendered a judgment "against any one not made a party to the suit, and who had in no manner," direct or indirect, "appeared in the case." Here a moneyed judgment for more than \$200,000 had been rendered against the United States, though not a party, direct or indirect, to the proceedings.

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But even where *money* is the subject of judicial proceeding, it is held that a court may proceed to the point of determining what amount is due the government without regard to the fact that the power to order execution be not within its jurisdiction. *United States v. Bank of Metropolis*, 15 Pet. 377; *De Groot v. United States*, 5 Wallace, 419; *United States v. Eckford*, 6 Wallace, 484; and many other cases. In a case, for instance, where government is plaintiff, and a set-off proved against it exceeds its own demand, the judgment is only that the defendant go without day. *Reeside v. Walker*, 11 Howard, 590. And "this for the reason that no officer in a republic, however high, not even the President of the United States, much less a secretary of the treasury, or treasurer, is generally empowered to pay debts of the United States when presented to him."

Suits for money debts stand on a different footing from suits respecting specific personal property claimed by government. But, we repeat, that although a moneyed judgment cannot be rendered against the government except where authorized by law, the mere fact that it cannot be, does not of itself suffice to defeat the jurisdiction of a court to ascertain what is due the citizen.

This examination into decisions of the courts could be pursued until research degenerated into pedantry; and it is confidently believed that the result of a discriminating and candid reading of them all would be precisely that derived from the leading cases already cited, namely, that courts of justice may take cognizance of actions affecting the personal property of the government of a sovereign power whenever the service of *mesne* process before adjudication does not involve the seizure of the property out of the hands of its officers, even though the proceeding look to a judgment, final execution upon which, if issued, would dispossess the government.

Before passing on to cases involving real property, I will mention the case of *Cohens v. Virginia*, 6 Wheaton, 264. There, I believe for the first time, arose the question whether a State, having prevailed below in a suit in which she was prosecutor by indictment, might be made defendant to an appellate proceed-

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ing for carrying the case up to the Supreme Court of the United States, in spite of Amendment Eleven of the Federal Constitution, forbidding suits against the States. It is hardly worth while to state that the proceeding was sustained by the Supreme Court.

I think now the way is cleared for an examination of the authorities which bear upon the precise question which we have in hand, namely, whether a statutory action of "ejectment," which is used in this instance in lieu of the old English writ of right, lies to test the title in lands claimed by the United States, all of which the government has in possession, and a part of which, at least, it has in actual use for a necessary public purpose, the United States being only indirectly a party.

The chief reliance of counsel for the government in denying such jurisdiction is upon English cases; but it is useless to say more than I have done in demonstration of the fact, that no authorities indicating the state of the law in England on the question whether ejectment will lie to recover lands held by the Crown, have any application in the present case. This is only in statutory name an action of ejectment, being really in technical effect a writ of right. It was not necessary, in installing this suit, to make entry and disseisin, or to feign to do so, on lands held by the sovereign power, as it would have been under the old practice in England. There was no intrusion, actual or fictitious, on the sovereign's tenure in the incipency of the action, and the possession of the government remains as free from actual disturbance, and its dignity from actual or intentional insult, as if there were no suit pending at all to test its right to hold these premises.

There is no doubt of the fact, that in England ejectment will not lie to recover lands in possession of the Crown. There are technical reasons for this fact which, though once founded in reason, are no longer so; and there are real reasons. One of the technical reasons is, that the possession of the Crown, however wrongful, is exempt from intrusion by the entry and disseisin which were deemed necessary to the commencement of ejectment. Another is, that since Edward I, or at least since James I (Allen's

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Royal Prerogatives, 93), the practice established by the courts has required another remedy to be pursued, namely, the *petition of right*. So that now, in England, the action of debt will no more lie where detinue ought to be brought, than ejectment where the practice requires the *petition of right*.

The spirit of the English law, as well as the temper of the English constitution, require that suits against the sovereign shall be in *precatory* rather than in mandatory form. But while the law and the constitution are thus far in accord, it must be confessed that there is a wide difference between the ideal king of the English lawyers, who is above law, and the real king of the British constitution, who is subject to law. He is represented in the law-books as an absolute sovereign; as, indeed, a supernatural being who never dies, who is present at one and the same time in every court of his dominions, who can neither do wrong nor imagine evil, and who is incapable of any act of impropriety, folly, or weakness. In contemplation of the lawyers the king is not only everywhere in the courts, but at the same time commands the army and navy, bestows all honors and titles, represents the majesty of the whole community at home, conducts all correspondence and negotiations abroad, makes peace or war, and binds the kingdom by contract or treaty. In their minds he is a corporation sole, he is an artificial person that never dies, he cannot be summoned before an ecclesiastical or secular court, he cannot commit treason or felony, and cannot suffer punishment or corruption of blood, nor be imprisoned or outlawed. While such is the king recognized by those of us who have studied the English law-books, those who have also studied English history know that the sovereign of the constitution is a very different character, of whom it is watchful and jealous, whom it often denounces, frequently prosecutes, sometimes deposes, and occasionally beheads.

Of such a king as that of the English lawyers we have known nothing in America for one hundred years, and it is simply idle to cite, in American courts, precedents and authorities from English courts, which, after all, merely lay down the principle that suits against the Crown must, for a thousand reasons founded in

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English sentiment, be in *precatory* and not in *mandatory* form. Nothing is more true than that in England, for reasons which have no existence or countenance in America, ejectment will not lie for lands in possession of the Crown. And it is also the case, although it was not formerly so, that the writ of right, which is not originated by entry, but is commenced by mere *præcipe*, will not lie. The single, sufficient reason why neither ejectment nor writ of right will lie is, that a petition of right has become, in modern practice, the proper remedy in England for suits against the sovereign. See *Sadler's Case*, 4 Coke, 55 a; *The Bankers*, 14 How. State Trials, 28; *Attorney-General v. Hallett*, 15 Meeson & Welsby, 106; *Legh v. Roe*, 8 Meeson & Welsby, 519; *Hovenden v. Lord Anersley*, 2 Schoales & Lefroy, 617; and 1 Anstruther, 215.

The nature of this proceeding is nowhere more succinctly and fully explained than in 4 Minor's Institute, 667, as follows:

This is a proceeding in chancery, originating at common law, it is said, under the auspices of Edward I, used where the king is in full possession of any hereditament or chattels, and the petitioner suggests such a right as controverts the title of the Crown, grounded on facts disclosed in the petition itself, in which case he must be careful to state truly the whole title of the Crown, otherwise the petition shall abate, and then upon this answer being indorsed on the petition of the king, *soit droit fait al partie* (let right be done to the party), a commission issues to inquire of the truth of this suggestion; after the return of which the king's attorney is at liberty to plead at bar, or to demur, and the merits are then determined as in suits between subject and subject. And if the right be determined against the Crown, the judgment is *quod manus domini regis amoveantur et possessio restituatur petenti salvo jure domini regis*, whereby the Crown is instantly out of possession without the necessity for the indecent interposition of its own officers. 3 Bl. Com. 256-7; Bac. Abr. Prerog. (E) 1 Th. Co. Lit. 303 and seq., and notes N. and O; *Baron de Bode's Case*, 8 Ad. and E., N. S. (55 E. C. L.), 208 (where the mode of proceeding is stated).

In the case of *The Baron de Bode* it will be seen that the court exhibited a disposition to enlarge and extend the scope of the petition of right, rather than to narrow it.

The truth is, that all the learning which is cited from the

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English reporters, showing that other remedies will not lie against the sovereign, and that petition of right must be resorted to, at the same time shows that the sovereign may be and is habitually sued in England in the form prescribed by English practice, so that it may be said, to the glory of England, that the words of John Selden and of the elder Pitt, which have been quoted, are true.

In that country, probably more than any other pervaded with the spirit of obedience to law, fidelity to contracts, and reverence for the tribunals and instrumentalities of justice, there is a remedy open for every grievance. *Non recedant querentes in curio regis sine remedio.* All that the injured person is required to look to is, that he seek his remedy, be it against the king or a private person, at the proper source ; his remedy against the king being as open and free to him as against any other person.

Mr. Broom, in his note to *The Banker's Case* (Constitutional Law, 241), has this just and lucid explanation of the subject of remedies in England :

The Crown submits, as is abundantly proved by the cases already cited, to have its prerogatives openly discussed and investigated in courts of justice, and allows a remedy against itself for any infringement of the subject's right, *provided such remedy be sought where it can be had.* The constitution of England, as remarked by Lord Holt (14 St. T. 784), "has wisely distributed to several courts the determination of proper causes, but has left no subject in any case where he is injured without his adequate remedy, if he will go to the right place for it. If a man will seek for a remedy at common law for a legacy, it is his own fault if he do not recover ; as it would be if he should begin a suit for land in the Court of Admiralty, or go for equity in the Common Pleas." And so if the subject has cause of complaint against the Crown, he must proceed for redress by that pathway which the constitution has laid down for him. For an illegal invasion of his liberty he should proceed by *habeas corpus* ; to obtain the revocation of a grant which injuriously affects him he should proceed by *scire facias* ; for an illegal invasion of the right of property he should proceed by *petition of right*, speaking of which latter remedy Sir W. Blackstone (3 Com. 255) tells us that the law has thus furnished the subject with a "decent and respectful" mode of informing the king of a grievance, and soliciting redress. This mode of procedure is appropriate for inducing restitution by the Crown of land or chattel property, of which it has, through misinformation or inadvertence, wrongfully possessed itself.

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It is apparent from these authorities that the Crown in England *may be sued*, and that the petition of right is the remedy supplied by the English law for an aggrieved subject, by which he may have his claim against the Crown *judicially determined*. I do not think, therefore, that the practice, or the legal authorities, in England can with any reason be adduced in support of the attitude held by the government in this cause.

Nor is the view of counsel for government correct that the petition to Congress here is the equivalent of the petition of right in England; for the petition to Congress is a *political* remedy, whereas the petition of right is strictly *judicial*. The only equivalent here of the petition of right is the right given by statute to sue in the Court of Claims, a grant, however, which does not extend to such a claim as that of the plaintiff in the present action.

Yet I will venture the opinion that the clause of the Fifth Amendment to the Constitution, which forbids the taking of private property for public uses without just compensation, *proprio vigore* gives jurisdiction to the courts of suits brought directly against the government for the recovery of property, where the complaint avers that the property was taken without just compensation.

For the present case, and those of its class, there is no jurisdiction specially derived from the express legislation of Congress, just as there is probably no express law of Congress authorizing by name the action of debt or trespass on the case; and this being an inferior court, we must needs look to the decisions of the Supreme Court of the United States for that judicial legislation which supplies in the present instance the only chart by which we may direct our course.

I come, therefore, in conclusion to consider those cases decided by the Supreme Court of the United States, in which the government of a State or of the United States has been indirectly sued in respect to lands in its possession, whether held or not for public purposes.

The leading case on the subject, and the first in point of time, is that of *Meigs et al. v. McClung's Lessee*, 9 Cranch, 11. The

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land in dispute was occupied by the United States as a military garrison. In a treaty settling the boundary of the territory of the Indians, and extinguishing their title to the rest, in the now State of Tennessee, the government had reserved a right to put a garrison on the Indian portion, and to use a reserve of three miles square in connection with it, but it happened that the Indian land did not extend above the mouth of the Highwassee River, and the government was unfortunate enough, through a mistake, to put its garrison above the mouth of the river on private property, and not below the river on Indian ground.

An action of ejectment was brought and the process served on Meigs, the military officer of the United States in command at the garrison. The cause proceeded to judgment in the Federal court below, and went up on writ of error to the Supreme Court of the United States. The cause was there heard, and Chief Justice Marshall delivered the unanimous opinion of the court in these words :

This court is unanimously and clearly of opinion that the Circuit Court committed no error in instructing the jury that the Indian title was extinguished in the land in controversy, and that the plaintiff below might sustain his action.

Though it was "objected and insisted that the action could not be maintained against them because the land was occupied by the United States troops, and the defendants as officers of the United States for the benefit of the United States and by their direction," yet it does not appear from Mr. Cranch's report of the case that the question of jurisdiction was raised by plea in the court below. That point does not seem to have been relied upon by the government as a ground of error in the argument above. And so the counsel for the government in the present case, with that extraordinary and commendable diligence and alacrity which has characterized them throughout its progress, object that, as an appellate court does not consider any grounds of error but such as are relied upon in the record brought up to it, so the Supreme Court could not have considered this question of jurisdiction in the case of *Meigs v. McClung's Lessee*. They

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cite *Montgomery v. Hernandez*, 12 Wheaton, 130; *Murdoch v. Memphis*, 20 Wallace, 590; *Venden v. Coleman*, 1 Black, 472; *Webster v. Cooper*, 10 Howard, 54; *Brown v. Huger*, 21 Howard, 305. But it seems to me that the question of jurisdiction is one which does not fall within the rule stated by counsel, or within the reason of the rule, and that the court below and the Supreme Court could not but have considered that question in the case under consideration. Whether or not the court had jurisdiction to try the title of the United States in property held as a garrison by officers and visible troops of the army, for a *bona fide*, patent, necessary public purpose, was, it seems to me, of the very essence of the case before the Supreme Court, and the language employed by the court in rendering its decision, that "the plaintiff below might sustain his action," seems to imply that, whether the question of jurisdiction which the consent of counsel cannot affect was technically before it or not, it was distinctly and expressly passed upon by it. Here the judgment was against the government.

Another case of ejectment, to recover Fort Dearborn, at Chicago, a possession of the government, occupied by its army officers, for the purpose of a military station, was that of *Wilcox v. Jackson*, 13 Pet. 498. The action was brought in a State court, and was proceeded in there to judgment. 1 Scammon (Ill.), 344. It was taken by writ of error to the Supreme Court of the United States, and that court heard the cause and proceeded to judgment upon it.

In that case the decision of the State court against the government was reversed, and a judgment for the government given by the Supreme Court. The judgment in each forum was upon the merits, and not upon the question of jurisdiction. The State court took jurisdiction upon the merits, and the Supreme Court reversed the State court upon the merits, taking no notice of the question of jurisdiction. Counsel for government in the present case admit that the Supreme Court in that case "in deciding upon the law of the case decided the question of jurisdiction;" though they think that, as it was decided upon agreed facts, the question of jurisdiction was virtually waived. But can a merely

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implied consent give jurisdiction in such a case? Consent of counsel does not give jurisdiction where jurisdiction is of the essence of the proceeding. *Mordecai v. Lindsay*, 19 How. 199; *Montgomery v. Anderson*, 21 How. 386; and *Ballance v. Forsyth*, 21 How. 389.

In the case of *Grisar v. McDowell*, 6 Wallace, 263, the plaintiff claimed as seized in fee the presidio of the old pueblo of San Francisco, then occupied by the United States, and brought his action indirectly against the United States, who set up that the property was public property of the United States reserved for military purposes. The defendant named was General McDowell, commanding the military post, and process was served on him. The Circuit Court entertained jurisdiction of the cause, and proceeded in it to judgment. It was thence carried to the Supreme Court of the United States, which proceeded in it to judgment. The report does not show that in either court the question of jurisdiction was expressly raised. But certainly they could not have considered that the mere fact of possession by the United States and use of the property for public purposes was sufficient to defeat their jurisdiction. They looked narrowly and diligently into the grounds of the title of the plaintiff and of the United States, and they each decided the case, on the relative strength of the two titles, in favor of the United States. The fact that the property was claimed by the United States, was in the possession of its officers, and in its actual necessary use for military purposes, intruded itself into the cause at every stage, and neither court deemed this fact sufficient to defeat its jurisdiction, and each proceeded to consider and decide the case on its merits.

I now come to the latest case which has been decided in the Supreme Court of the United States, in which the question now before this court was brought under review. This was the case of *Cooley v. O'Connor*, 12 Wallace, 391. The action was ejectment. It was brought to recover a lot of ground in the town of Beaufort, South Carolina, owned by the United States. Process or notice in ejectment was served on the occupants, who were tenants of the United States. It was a case in which the United States were sued indirectly, in ejectment for property claimed by

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government. The claim, as in the case now at bar, was founded on a tax-title obtained at a sale made *durante bello* by direct tax commissioners of the United States for delinquent taxes. The action of ejectment brought was the old one of trespass *quare clausum fregit*, with indorsement that "the action was brought to try title as well as for damages." It was the equivalent of Blackstone's English action of *ejectio firmæ*. It was a case to which the English authorities cited by counsel for government apply directly, and with which the English cases which they rely upon run on all fours. The government was using the lot of ground sued for, for public purposes, virtually as it is using the 882 acres of Arlington, those purposes being rather imaginary than real. The defendants were one Cooley, one Judd, and others. Cooley was the tenant of a government lessee, and Judd a clerk of the United States for certain, in his view, important purposes. From the exceptions of the defendants set out in the record, the following is an extract:

And the defendants, to maintain and form the issue on their part, gave in evidence tending to show that Samuel A. Cooley was in possession of a portion of the premises in the plaintiff's declaration mentioned, as a tenant of George Holmes, who had leased said portion of said premises from the United States direct tax commissioners at Beaufort, S. C.; that as such tenant he went into possession in June, 1867, and continued therein until about the 1st of December, 1868; that the said Henry G. Judd occupied a portion of said premises in the plaintiff's declaration mentioned as clerk of the United States direct tax commissioners at Beaufort, and by their permission and direction; that he was in possession of said premises from or about the 1st of June, 1867, until about the 1st day of December, 1868; that said Cooley and Judd, defendants, had no other right, title, or interest in said premises, except as hereinbefore set forth, being mere tenants at will, in possession, and that they derived their right to possession from the United States direct tax commissioners at Beaufort, S. C., who acted and assumed to act for and on behalf of the United States of America.

Of this cause the Circuit Court below took jurisdiction, heard it on the merits, and proceeded to judgment. When carried up the Supreme Court did the same. The government had lost the case in the Circuit Court on an instruction to the jury. The Supreme Court found error in the instruction, and what did it do? Did it reverse the judgment below and order the lower

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court to dismiss for want of jurisdiction by reason that the United States was the only defendant in interest? It did not. Its order, as reported, was "judgment reversed and *venire de novo* awarded."

These decisions of the Supreme Court are supported by several cases decided in other courts of the highest authority. Mr. Justice Grier had held the same view as to the jurisdiction of a court in *Elliott v. Van Voorst*, 3 Wallace, Jr., 301. In that case the government of the United States by some accident of business had become the owner of the equity of redemption in some land in New Jersey, and a proceeding had been taken by a mortgagee to foreclose his mortgage. It was necessary under the rules governing chancery suits to give notice of the proceeding to the United States, standing virtually in the shoes of the mortgagor, and Mr. Justice Grier, sitting in Circuit Court, held that, *quoad hoc*, the United States held as a private person and not as a sovereign, and might be served with notice of the proceeding just as any private mortgagor or holder of his equity of redemption might be served.

In *Dreux et al. v. Kennedy et al.*, 12 La. 489, decided in 1846, plaintiffs sued the defendants to recover lands in Louisiana alleged to be in their possession. The latter prayed for a dismissal, averring that the property was in the possession of the United States, a branch mint having been erected thereon; that they were merely officers of the mint and not in possession of the premises and had no authority to represent the United States. But it was held that the exception be overruled, the court saying:

Where the party in possession of land, when sued for it, points out the owner under whom he holds, he is bound to defend the action if such owner do not live within the State, or is not represented therein, or if such proprietor, lessor, or principal be the United States, against whom no direct action can be brought.

In the case of *French v. Bankhead*, 13 Gratt. 183, which was an action of ejectment, brought against the military officer in command at Fortress Monroe, Virginia, for the recovery of land of which the United States claimed to be owner, and occupied by him as such officer, and where the defendant was represented in the Supreme Court of Appeals of Virginia—the action having

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Opinion of the court.

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been brought in the State court and never removed to a Federal court—by counsel, one of whom (Jones) was at the time United States district attorney, and where it was decided in favor of the defendant, upon the ground that the United States was entitled to the property in controversy ; no objection to jurisdiction was made at any stage of the case. In *Polack v. Mansfield*, 44 Cal. 36, decided in 1873, after deciding that a mere servant or employé, who does not claim any interest in the premises, nor any right to their possession, and only in that manner occupies the premises, cannot be sued in an action to recover lands, the Supreme Court of California goes on further to decide :

That the rule which thus exempts the mere servant or employé of another from an action presupposes that the employer may be sued, and that the wrongs of which the plaintiff complains may be redressed by resort to an action against the employer, as being the real party committing the ouster. In a case, therefore, where the employer is for any reason not amenable to an action, the rule referred to has no application, and the employé or servant becomes *ex necessitate* the proper party defendant, since he is the only party who can be subjected to a suit at all. Were this otherwise, it would result, that open and admitted violation of private right would find no redress in the courts of the country. The government of the United States as such cannot be sued as a party defendant in the courts of the State ; and unless its servants and employés may be properly responsible for the lawless invasion of private property committed by them at the command of the government, the citizen is left wholly without the protection which it is the first aim and purpose of municipal law to afford.

There is but one other and very unimportant part of the case to be dealt with, and that is the intimation that in the event of the plaintiffs recovering in this action, the court would have no power to make good its judgment by final process. But the court will not imagine that its judgment would be resisted. That is a matter that must take care of itself. Mr. Justice Blair, in *Chisholm v. Georgia*, 2 Dallas, 451, after alluding to this argument *ab inutile* and speaking of the jurisdiction of the court being questionable on the ground that Congress had not provided any form of execution or pointed out any mode of making a judgment against a State effectual, said :

Let us go on as far as we can, and if, at the end of the business, notwithstanding the powers given us in the 14th section of the Ju-

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Opinion of the court.

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dicial Act, we meet difficulties insurmountable to us, we must leave it to those departments of government which have higher powers, to which, however, there may be no necessity to have recourse. Is it altogether a vain expectation that a State may have other motives than such as arise from the apprehension of coercion to carry into execution a judgment of the Supreme Court of the United States, though not conformable to its own ideas of justice?

To the same effect were the words of Mr. Justice Grier in the case of *Elliott v. Van Voorst*, where, in meeting the objection that there was no precedent to be found for his assuming jurisdiction of a cause, judgment on which the process of the court might be inadequate to enforce, with that practical wisdom and downright-ness of speech which characterized him he said: "It is time there was one."

Is it possible, in the light of these cases, to hold, that the fact of the Federal government being claimant by record-title of property which is made the subject of an indirect suit against it, in possession of the property, and in the actual use of it for public purposes, defeats the jurisdiction of a court to look into the grounds of its title and decide the action upon the merits?

Sitting here, in an inferior court, I am not at liberty so to hold, because to do so would be to overrule the Supreme Court in all the four cases of *Meigs v. McClung*, *Wilcox v. Jackson*, *Grisar v. McDowell*, and *Cooley v. O'Conner*.

I have found it impracticable to make mention of each of the multitude of authorities which were cited in the argument of the cause. I have, however, examined them all, and think that I have adopted the teaching of most of them and done violence to that of none.

In the fact that the case at bar is the only one yet arising in which this especial question of jurisdiction has been raised at the outset of proceedings, and in which the fate of the government's title has seemed to depend wholly upon this question, the present is a case of first impression.

It is not to be denied that this cause is before the court in a form not heretofore known to American precedent; that is to say, it presents a case in which the sovereignty sued, comes into court, in the first incipency of the proceeding, deigning to pro-

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Statement of the case.

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test its exemption from amenability to the action, but disdaining to submit itself, as may have been done in the cases last cited, to the jurisdiction of the court.

A case of such consequence will naturally ascend from this forum to the lofty and most profoundly revered tribunal of ultimate resort provided by the Constitution of the United States.

With firm judicial confidence I sustain the demurrer of the plaintiff in this cause, and direct that it shall proceed to trial on the issues raised by the plaintiff's answer to the attorney-general's suggestion. If, then, it shall go up to the Supreme Court, as I doubt not it will do, I shall console myself with the memorable reflection of Lord Nottingham, in the case of *The Duke of Norfolk*:—I am not ashamed to have made this decision, nor will I be wounded if it should be reversed.

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*United States Circuit Court, Eastern District of Virginia, at Alexandria, 24th to the 30th January, 1879.*

G. W. C. LEE v. KAUFMAN ET AL.

Under the act of June 7th, 1862, amended by that of February 6th, 1863, "for the collection of the direct tax in insurrectionary districts," etc., as construed in *Bennett v. Hunter*, 9 Wallace, 326, and *Tacey v. Irwin*, 18 Wallace, 549, a tender by friend or agent of the owner of the tax due upon property advertised for sale is a sufficient tender; and, moreover, if the tax commissioners have, by an established general rule, announced, and a uniform practice under it, refused to receive the taxes due unless tendered by the owner in person, even a formal offer by another to pay is unnecessary. It is enough if a friend or agent of the owner went to the office of the commissioner to see after the payment of the tax on the property, but made no formal offer to pay because it was in effect waived by the commissioners, they declining to receive any tender unless made by the owner in person.

IN ejectment.

The case came on for trial on the merits at this term of the court, the same counsel on either side in attendance as on the trial of the question of jurisdiction, and was put to the jury. The only questions of law that could arise in the case were of course

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Opinion of the court.

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upon the prayers of counsel for instructions to the jury. These prayers were numerous, but none of them touched the merits of the controversy very essentially except those which were commented and passed upon by the court in the following opinion of the court delivered in the course of the trial.

OPINION OF THE COURT, AT THE TRIAL ON THE MERITS.

HUGHES, J.—The two instructions\* asked for by the plaintiff, and the instructions No. 1 asked for by the defendants, depend upon the same principles of law, and may be considered together. I think these instructions embrace the principles of law which control the case under trial, and it would seem to be hardly necessary to give much special consideration to the other instructions offered.

I will premise that the certificate of the sale of Arlington made by the tax commissioners, which can be impeached only by showing either, 1st, that the property was not subject to the tax for which it was sold; or 2d, that it was after the sale redeemed from the tax according to the provisions of the law of 1862; or, 3d, that the tax had been paid before the tax sale; is impeached by the plaintiff in this suit only on the last of these grounds. The sale is conceded to have been valid in other respects.

This objection to the sale is made by the plaintiff not on the claim that the tax was in fact paid, but on the claim that he (or his predecessor in title) did all that he was bound to do by law towards paying it; that the non-receipt of it by the government was not through fault of his, but through fault of its own officers; and that, having himself done what was the equivalent of paying the tax, the land was not forfeited by law, and the commissioners' sale of the property for the tax was therefore unauthorized, null, and void.

The instructions under consideration all relate to the question whether the acts of the plaintiff (or of his predecessor) in regard to the payment of the tax were in law the equivalent of payment

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\* They are given at the end of this opinion, p. 149.

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Opinion of the court.

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to the extent of preventing a forfeiture. The plaintiff's claim is, that through a friend or agent he went to the tax commissioners, at their office, during the period when the tax was receivable by law, with money in hand for the purpose, and proposed to pay the tax, but was prevented from doing so or from tendering payment by being informed by such one or more of the commissioners as were then in their office, that the tax would not be received except from the owner of the land in person. He claims, moreover, that this rule of the commissioners, this construction which they put upon the law of 1862 and 1863, was so generally known and announced as to amount to a waiver of tender on their part, and that he was thereby exonerated from the useless task and nugatory formality of making tender or offer of payment through an agent or friend (through whom he had a right to act in the matter), and was thereby relieved in law from default, and his land from forfeiture for the tax.

The single question raised by the three instructions under consideration is therefore whether the tax imposed upon this estate by the law of June 7th, 1862, "for the collection of direct taxes in insurrectionary districts," as amended by the act of February 6th, 1863, could be paid except by the owner in person.

The clauses of the act of 1862, as amended, under which the sale of Arlington was made, are substantially in the following words. Section 3 provides,

That it shall be lawful for the owners of land, within sixty days after the tax commissioners shall have fixed the amount, to pay the tax thus charged into the treasury of the United States or to the tax commissioners, and take a certificate thereof, by virtue whereof the land shall be discharged from the tax.

Section 4 declares the land forfeited on the non-payment of the tax as required by section 3.

Section 7, after providing that if the tax is not paid as required in section 3 it shall be sold, goes on in one of its clauses to provide substantially :

That in all cases where the owner of land shall not, on or before the day of sale, appear in person before the tax commissioners and pay the amount of the tax, with interest and cost of advertising, and request the land be struck off for a less sum than two-thirds of its

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Opinion of the court.

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assessed value, the tax commissioners shall be authorized at the tax sale to bid off the land for the United States at a sum not exceeding two-thirds of its assessed value, unless some person shall bid a larger sum, in which case the land shall be struck off to the highest bidder.

In another clause of the same section 7 it is provided, substantially,

That at the tax sale, any tract of land which may be selected under the direction of the President for government use, for war, military, naval, revenue, charitable, educational, or police purposes, may be bid in by the tax commissioners for, and struck off to, the United States.

Another clause of section 7 allowed the owner of lands so sold to *redeem* the same, in the following terms:

The owner of said lots of ground, or any loyal person of the United States having any valid lien upon the interest in the same, may, at any time within sixty days after said sale, appear before the said board of tax commissioners *in his or her own proper person*, and, if a citizen, upon taking an oath to support the Constitution of the United States, and paying the amount of said tax and penalty, with interest thereon from the date of the said proclamation of the President mentioned in the 2d section of this act, at the rate of fifteen per centum per annum, together with the expenses of the sale and subsequent proceedings, to be determined by said commissioners, may redeem said lots of land from said sale, etc.

These having been the provisions of the law in force at the time of the tax sales under consideration, it is obvious that all sales at which private persons became purchasers must have been made under the first quoted clause of section 7; and, the price bid for Arlington (\$26,200) having been more than two-thirds of its assessed value (\$22,733), and it having been struck off to the United States at such price, it is equally obvious that the sale of Arlington was made under the second quoted clause of section 7, and could not have been made under the clause first quoted.

Upon this state of the law, the Supreme Court of the United States, in the case of *Bennett v. Hunter*, 9 Wallace, 326, in which Bennett had purchased land under the first clause of section 7 above quoted, decided that a tender of the tax by an agent of the owner to the tax commissioners, before the tax sale, was equiv-

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Opinion of the court.

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alent to a payment, so as to destroy their authority to sell and to render their sale invalid; and it so held, notwithstanding the language of the first above-quoted clause of section 7, providing that sale might be made in all cases in which the owner had not, before the sale, appeared *in person* before the tax commissioners, and paid the tax. The court expressly remarked in its decision, that it "did not perceive in the terms of the act any limitation of the right of paying the tax to the owner in his proper person."

In ascertaining who was authorized to pay the tax, which it expressly said was the only question in the case, the court seemed to feel bound to confine its view to section *three* as the part of the act which determined the rights of the owner of land in regard to paying the tax—a section which did not expressly require the owner to pay in person. The court in determining *this* question, refused to consider the terms used in section *seven*, the object of which section was, not to determine the rights and duties of the owner of taxed land, but the powers and duties of the tax commissioners after the owner had failed to pay the tax. It was not necessary for the court in this case to look beyond and above the terms of the statute in determining the rights of the owner of taxed land, but I think it was evidently in its mind that there was no power in Congress to impose conditions much less disabilities upon the owner of land subject to taxation, as to the manner of *paying* the tax at any time before the divestiture of his title by a tax sale made after delinquency and forfeiture. It distinguished the indefeasible right of the owner to pay the tax by an agent before sale, from the right of *redeeming* the land after forfeiture and sale; intimating that Congress might properly limit the right of *redemption* to the owner *in person*, while it could not constitutionally prohibit *payment* of the tax by an agent before the sale. I say that it was not necessary for the court to resort to this higher ground in deciding *Bennett v. Hunter*, but from the tenor and spirit of its language I am persuaded that the proposition was in its mind that Congress had no power to restrict the owner of land, in paying the tax, to payment in his own proper person.

In the case of *Tacey v. Irwin*, 18 Wallace, 549, the tax sale

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Opinion of the court.

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of the land had been made to a private purchaser under the first quoted clause of section 7. In that case no tender of the tax had been made by Irwin's agent. The language of the record on this point in the court's finding of the facts is:

Whilst the said premises, however, were advertised for sale, his (Irwin's) brother-in-law went to the office of the commissioners to *see after the payment of the tax* on the property, *but made no formal offer or tender of payment*, because such offer or tender was, in effect, waived by said commissioners, they declining to recognize any tender unless made by the owner in proper person.

This case differed from that of *Bennett v. Hunter*, in the fact that there was no tender of the tax to the tax commissioners by the friend or agent of the owner. The owner's brother-in-law merely went to see after the payment of the tax, but made no formal offer or tender of it, that being virtually waived by the commissioners in declining to recognize any tender unless made by the owner in proper person. Judging from the language of the court, the decision in that case, as I read it, was based not merely on the presumption that an offer would not have been made, but for the refusal to recognize a tender by an agent in that particular instance, but was based also on the fact that it was the rule and practice of the commissioners so to refuse. I think a careful and unbiassed reading of the decision in *Tacey v. Irwin* leads to the inevitable conviction that it was based chiefly on the existence of that rule and practice, and but partially, if at all, on such declarations of the commissioners on the occasion when Irwin's brother-in-law called "to see about paying the tax," as deterred him from making a formal tender. But I think the higher principle on which both of the decisions under review were made was, that the language quoted in section 7, implying a requirement that the owner should pay the tax in person, was overridden by the superior principle of constitutional law, that Congress had no right in levying a tax for purposes of revenue, to impose disabilities or denounce penalties for political conduct, thereby converting revenue laws into instruments for indirectly confiscating that entire estate in land which the Constitution forbids Congress from confiscating by direct laws.

But whatever view might have been in the mind of the court,

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Opinion of the court.

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*Bennett v. Hunter* and *Tacey v. Irwin* were cases involving lands which were sold under that provision of section 7 which expressly gave authority to sell in all cases where the owners had not appeared in person before the commissioners and paid the tax. The court decided that sales thus expressly authorized were nevertheless void when the owners had through friends or agents tendered payment of the tax, and that the law would presume that owners were ready to make offer of payment by friends or agents if such offer had not been rendered nugatory in advance by a rule and practice of the commissioners to receive the tax only from owners in person. If, therefore, sales expressly authorized by the language of section 7 were void, then for a stronger reason was the sale of Arlington void, which could not, as I conceive, have been made under this clause of section 7, apparently containing such express authority, but was made under another clause of that section, which authorized sales to the United States of such lands as the President should direct to be purchased for military, educational, or kindred purposes, without reference to whether or not the owner had offered to pay the tax by a friend or agent. If the principle on which the Supreme Court decided the sales of Hunter's and Irwin's lands to be void was so strong as to override express language authorizing them, found in the law, it certainly may be followed in the present case, where the land was sold under a provision which in terms gave no authority to sell lands of persons who had not appeared in person to pay the tax.

I cannot agree with defendants' counsel in the opinion that the two clauses in section 7, one of them authorizing sales to both government and private persons, but restricting the government to bids not exceeding two-thirds the assessed value of the lands, and the other clause, directing the sale of lands to the United States without restriction of price when the President ordered their purchase for certain purposes, as both governing in such sales as that of Arlington. I think the clauses are distinct and several, each of them authorizing sales which could not have been made under the other. The sale of Arlington could not have been made under the prior clause of section 7, because it was not made to a private person, nor made to the United

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Opinion of the court.

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States at a price less than two-thirds of its assessed value. How, therefore, could both clauses have governed in this sale? The language of the prior clause imposing disabilities as to the payment of the tax by restricting the right to owners in person, is for that reason to be construed strictly, is to be given as limited an application as possible, and is not unnecessarily to be extended to other clauses of section 7.

But even if this rule of construction did not govern, I do not think that the language of the clause authorizing the sale of the lands of all owners who had not appeared in person and paid their taxes, could, by any logical construction, be extended to the other clauses of section 7. This clause is an independent provision, not found in the original law, not necessary to the sense of any other part of the law either in its original or present form, not connected grammatically or in logical course of thought with the context, but interjected into a place in the section no better suited to its admission than any other place, and having every characteristic of a piece of patchwork. I do not think it has any control over the other clause standing at a distance from it in section 7, under which Arlington was sold; and I do not think that the theory of defendants' counsel that the two clauses apply inseparably to all sales is tenable.

I do not think I ought to pass unnoticed the distinction which defendants' counsel drew in their argument for their instruction No. 1, between a tax sale made to a private purchaser, such as was passed upon by the Supreme Court in the two cases which have been under consideration, and a sale made to the United States, no instance of which has been considered by the Supreme Court in connection with the question whether or not an owner could pay his tax by an agent and not in person. They base this distinction upon the pretension that although under the decisions of the Supreme Court in the two cases referred to, a tender or offer of the tax made before the tax sale by a friend or agent of the owner is valid against the purchaser, if the land be afterwards purchased by a private person; yet, if the purchaser turn out to be the United States, that fact, under the language of the first-quoted clause of section 7, will retroactively render the tender or offer of the tax by a friend or agent, which was valid and

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Opinion of the court.

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sufficient before the sale, void afterwards as against the United States. I have already expressed the opinion that the language in the clause of section 7 referred to, does not apply to a sale to the government made under direction of the President, as this sale of Arlington was. But even if the case were otherwise, I do not see how such a distinction as counsel have taken can be maintained.

The decisions in *Bennett v. Hunter* and *Tacey v. Irwin* were intended to define the rights of owners of lands assessed with taxes, during the period anterior to the tax sales. The first decision distinguished between the rights of a landowner before the tax sale and his rights after the sale. It held that, as the object of the law under review was to raise taxes and not to inflict penalties for political conduct, it must be construed with reference to and in aid of that object. It held that an owner of taxed land had a right to pay the taxes due, through a friend or agent before sale; and the Chief Justice, I repeat, discriminated between this right of *paying taxes* by an agent, and the absence of the right to *redeem lands* after their sale for taxes, except in person. Those decisions establish the right of any owner of land, taxable under the laws of Congress imposing direct taxes, to pay the tax by a friend or agent, at any time before the tax sale.

If the owner had this right to tender or offer payment of a tax through a friend or agent at any time before a sale, and the right was denied him, then it is difficult to see how a subsequent sale to a particular purchaser could, by *ex post facto* and penal operation, annul that right. A law which makes such discrimination would seem to be unconstitutional, not only in giving to an act performed by government officials under it an *ex post facto* and penal effect, but also in depriving a person of his vested right in property by a process other than "due process of law," as that phrase is used by the Constitution. The impolicy of such a provision of law is as obvious to me as its unconstitutionality. Its evil would be liable to fall not only upon disloyal but upon the most loyal citizens. A severe illness lasting only ninety or a hundred days, would subject the owner of land to the irreclaimable loss of its possession and of all but two-thirds of its value; for the period of advertisement added to the sixty days

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Opinion of the court.

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allowed by the act for redemption, would require an illness of less than a hundred days to divest a citizen of his estate.

We can imagine, too, a case of even grosser injustice, which might happen by accident, though my respect for the government forbids me to think it could be morally possible by design. It might happen by accident that government, desiring a piece of land belonging to a loyal citizen engaged in its military service, might in time of war order his command to a distant and protracted service, rendering it impossible for him "to appear in person before the tax commissioners and pay the amount of his tax," and thereby bring on a sale of it for taxes, at which sale it would itself have the power to obtain the land irreclaimably. The familiar expedient employed by King David towards Uriah would here be repeated by accident. I doubt the constitutionality of any provision of a law for raising revenues which would subject to forfeiture lands upon which the taxes, when tendered in behalf of the owner, would by its own terms be prohibited from being received. A law passed for raising taxes, if containing provisions inflicting, without trial, disabilities and penalties for political conduct, in defeat of revenues, would be construed by any court liberally in aid of the provisions for raising revenues, and very narrowly as to the provisions inflicting penalties in defeat of revenues. I think I may construe the decisions of the Supreme Court, in the two cases which have been cited, as going to the extent of holding that the owner of land assessed for taxes under the laws of 1862-63 might pay them, or tender or offer to pay them, through an agent, at any time before the tax sale, as against all purchasers, whether private individuals or the United States. I therefore feel bound to refuse the instruction No. 1, prayed for by defendants' counsel.

On the other hand, on the authority of the decisions of the Supreme Court in *Bennett v. Hunter*, and *Tacey v. Irwin*, rendered upon the proceedings of the same tax commissioners as sold Arlington, and the validity of whose certificate of sale is now impeached on the same grounds as were relied upon in those cases, I feel not only authorized, but bound, to give the two instructions asked for by the plaintiff.

They are in these words:

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Opinion of the court.

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## INSTRUCTIONS FOR THE PLAINTIFF.

1. If the jury believe from the evidence that Philip R. Fendall, for and on behalf of the owner of the property in controversy, prior to the sale thereof of the tax commissioners, on the 11th day of January, 1864, offered to pay the amount chargeable on said property, under the act of Congress entitled "An act for the collection of direct taxes in insurrectionary districts within the United States, and for other purposes," approved June 7th, 1862, and the acts amendatory thereof; and that said offer was refused by said commissioners because it was not made by the owner in person, then said sale was unauthorized, and conferred no title upon the purchaser.

2. If the jury believe, from the evidence, that the commissioners, prior to January 11th, 1864, established, announced, and uniformly followed a general rule, under which they refused to receive, on property which had been advertised for sale, from any one but the owner or a party in interest, *in person*, when offered, the amount chargeable upon said property, by reason of said acts of Congress, then said rule dispensed with the necessity of a tender, and in absence of proof to the contrary the law presumes that said amount would have been paid, and the court instructs the jury that, upon such a state of facts, the sale of the property in controversy, made on the said 11th day of January 1864, was unauthorized, and conferred no title upon the purchaser.

The verdict of the jury was for the plaintiff.

The defence on the coming in of the verdict moved to set it aside as contrary to the law and the evidence of the case, and the motion was entered and set for hearing at an adjourned term of the court in the April following.

At the timeset for the hearing of the motion defendants' counsel relied upon a decision which had been shortly before made in the case of *Carr v. The United States*, since reported in Otto. But the judge did not think the case so conclusive as to justify a new trial, and a renewal of his ruling on the question of jurisdiction. He has filed the following note on that case:

## NOTE OF THE JUDGE ON THE CASE OF CARR v. THE UNITED STATES.

HUGHES, J.—In the case of *Carr v. United States* the court below and the Supreme Court, on a bill brought by the United States to test the validity of the title in real property, both held that the United States were entitled on the law and evidence, of right, to the property. There had been previous suits before State justices of the peace, and in county and other local State courts, in which the title of the grantor of Carr had been held good by these courts ; but in none of these suits were the United States a party of record, and only in some of these State courts were its officers or agents parties. The decision of the Supreme Court in this case of *Carr v. United States* is that judgments of inferior State courts to which the United States were not a party did not estop the United States from setting up their right in a suit in which they are properly a party. This is true on the general principles of estoppel. There is a dictum in the case that where it appears in the course of a suit for possession that the possession assailed is that of the government the suit ought to cease ; but this is a dictum, and I am not at liberty that the court would intend by a dictum to overrule its own judgments in the cases of *Meigs v. McClung*, *Wilcox v. Jackson*, *Grisar v. McDowell*, and *Cooley v. O'Conner*.

This case of Carr was one in which the legal title and the equities were on the side of the United States, in which this was decided to be the case, and in which the Supreme Court goes on to decide that contrary decisions on this title in inferior State courts in suits to which the United States were not a party did not estop the United States from recovering.

The case at bar—the Arlington case—is the reverse of this. The jury on the facts, and the court on the law of the case, have decided that the plaintiff is entitled to recover the land. The statutory law regulating the practice expressly allowed the right to be tried after service of the declaration in ejectment on the occupant of the land, and in the action of ejectment the government voluntarily intervened. There is no question of estoppel here. The case has gone to a verdict. Nothing remains to be done ex-

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Statement of the case.

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cept to enter judgment so that the case may go before the Supreme Court on a writ of error, or for execution to issue on the judgment. I should not be willing to order the execution under any circumstances ; but I do see nothing in the case of *Carr v. United States* to require me to dismiss this suit at the present time.

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*United States Circuit Court, Eastern District of Virginia, at Alexandria, January 13th, 1878.*

W. T. BLACKWELL & CO. v. W. E. DIBRELL & CO.

The right of exclusively using the word Durham in labels on smoking tobacco belongs to manufacturers of the article in the town of Durham, North Carolina ; and

The right of exclusively using the word in connection with the picture of a Durham bull in labels on smoking tobacco belongs to W. T. Blackwell & Co., of that town.

The right to use a trademark is forfeited by non-user for a period of eight years, and cannot be resumed in prejudice of one who had used it exclusively during the period of abandonment.

The assignment by one partner of all his interest in a firm to his co-partner carries with it, if not expressly reserved, the right to the exclusive use of a trademark of the firm.

A trademark consisting of a word and symbol arbitrarily assumed, may be lost by non-use by its owner, especially if the disuse continues as long as eight years.

If an equivalent trademark, without any knowledge of the first, be originated and devised by another person during such period of disuse, that other person may thereby acquire a right of exclusive use in the second trademark.

If this second trademark during such period of abandonment acquires a public and valuable geographical and commercial signification, so that the use of the original trademark as an arbitrary one would operate to deceive and defraud the public, a court of equity may enjoin against such use of the original one.

IN chancery.

Some time before the year 1860 the North Carolina Railroad was laid off over the farm of Dr. Bartlett Durham, in Orange County, North Carolina. A station was established there, and called Durham Station. This spot shortly became the seat of a

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Statement of the case.

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small tobacco factory, a blacksmith shop, a tavern, and the residence of two or three families. It remained an insignificant place until after the civil war, in 1865. It then began to grow up under the effects of a very prosperous tobacco business, which had risen there. In 1866 it was incorporated as a town and called Durham. Now it is a place of several thousand inhabitants, and of a very large business.

The original tobacco factory of 1860 was conducted by the firm of Morris & Wright. This firm principally manufactured plug tobacco, but it utilized its clippings and waste tobacco by putting it in bags and disposing of it as smoking tobacco.

Some time before, or in 1861, one of the partners of this firm, Wesley A. Wright (who is connected with the defence in this suit), sold out all his interest to the other partner, Morris, and went off into the neighborhood, where he manufactured tobacco in a rude way for a year, and then joined the Confederate army and disappeared from Durham Station. To that place he has not returned, either to reside or do business. He seemed to have paid a visit there about 1871 or 1872. We first hear of him after the war, as a tobacco manufacturer, in 1869, in Liberty, Virginia. He then went to Stewartsville, near Liberty. Hearing that J. R. Green, a successor to Morris & Wright, at Durham, was using the Durham bull as a trademark, he adopted the device of the head and neck of a short-horn bull on his tobacco. While at Lynchburg, in 1871, Wright sold to L. L. Armistead a patent which he had then recently obtained, No. 111,712, for a compound liquid flavoring—which he used in making an “improved smoking tobacco,” called “Durham Smoking Tobacco,” in which appellation he used the word Durham as an arbitrary term for the smoking tobacco made with the said patented flavoring liquid. Record, p. 211. All right to use the word thus derived by Armistead was sold by Armistead in September, 1872, to the firm of W. T. Blackwell, then consisting of W. T. Blackwell and Julian S. Carr, of Durham, N. C. Record, p. 207. It appears from the answer of defendants, Dibrell & Co., that they are and have been using, “with the consent and by the authority of the said Wesley A. Wright, a label substantially the same” as that used by the complainants, and filed by them as an exhibit, to wit: A

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label, having the words and device, "Established 1860 at Durham, N. C., the Original Durham Smoking Tobacco, W. A. Wright, originator and patentee."

The original factory of Morris & Wright, at Durham's Station, went on under different proprietors, and its business has gradually developed into that now conducted by W. T. Blackwell & Co., the complainants in this suit. It is probably the largest manufactory of smoking tobacco in the world.

Those who profess to know, ascribe the prosperity which has attended this business to the peculiar excellence of the tobacco grown in several counties north of Durham, which market their product at that place. They say that it is through the influence of the climate or soil, or both, that the tobacco raised in the counties of Alamance, Orange, Caswell, Person, and Granville, in North Carolina, three-fourths of which is brought to Durham, has this quality. It is probable that there is more demand for the Durham tobacco as a smoking tobacco than for any other grown in the United States. It is regarded as superior to all other articles for making granulated tobacco on account of its bright color and fine natural flavor; its being chiefly flue, sun, or air cured, and thin in the leaf and sweet. Nineteen-twentieths of the tobacco manufactured at and sent from Durham are grown in the counties named. Durham is the principal market for the tobacco of these counties.

A circumstance which is claimed to have given this tobacco the most sudden and widespread celebrity was the following: Just at the close of the war the factory at Durham, which has been mentioned, had come down by assignment and succession to, and was then conducted by, one J. R. Green. At the time that Sherman's and Johnston's armies were in Orange County, Green happened to have a large quantity of loose leaf tobacco lying in bulk on the floor of his factory. Of course this was a prey which soldiers of either army as they passed along eagerly seized upon, and the evidence is that the whole of this loose tobacco was thus carried away, and as the armies were soon disbanded much of it is conjectured to have been carried to distant parts of the Union. At all events the excellent quality of this smoking tobacco speedily obtained widespread advertisement

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and celebrity, and ever since then orders have come to Durham from every quarter of the United States.

J. R. Green found his business growing up rapidly under his hands. He at once adopted as his brand or label, and put it upon his bags, the words, "Durham Smoking Tobacco." He connected with these words the side figure of a short-horn bull, as a symbol of the word Durham; and he had a full-size painting of such a bull placed broadside upon his factory, in conspicuous view of the railroad, as an advertisement of his business to all travellers. Green having died, his business passed by succession and assignment to Blackwell and others, and is now conducted by W. T. Blackwell & Co., the complainants in this cause. The name Durham placed in Green's brand was, of course, suggested by the place where the species of tobacco in which he dealt was principally marketed, and was intended as descriptive of that tobacco. It indicated tobacco grown in what Wheeler calls the "Golden Belt of North Carolina." The trademark of a Durham bull was naturally assumed as a symbol of the word Durham, which had come to characterize the particular growth and quality of tobacco which is marketed and manufactured at Durham.

Those who claim under Wright disclaim that the word Durham, as used by him and them, has any reference to the place, Durham's Station, or Durham, in North Carolina, or to the tobacco marketed there by planters. They claim that Wright, when he manufactured tobacco near Durham's, a place then of utter insignificance, used the word Durham as an arbitrary term; that his tobacco was flavored with certain liquids invented and artificially concocted by him; that it was this flavoring, and not the soil or climate of the region trading to Durham, that gave his tobacco its excellence, and that the name Durham and the device of a Durham bull were suggested to him about the year 1860 by seeing the brand of Durham mustard on a tin box. Wright's testimony on this head is as follows: Was in business at Liberty, Va., in 1869; that was the first time the bull's head was used; first view was to adopt the entire bull in connection with the word Durham; the reason of not doing so was that his two sons in Kentucky wrote him that J. R. Green, of Durham,

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N. C., had adopted the bull on his brand, and he did not wish to interfere with anything that was ahead of him; first conceived the idea of using the word Durham and the bull in connection with it in 1860; and the reason why he did not carry it out until 1869 was his inability to do so for want of funds; the idea was first suggested by picking up a card [can?] of Durham mustard with the vignette of a bull on it.

Wright claims that Morris & Wright used the word Durham on their labels in 1860, and that he himself used the word in his label when living near Durham in 1861; but the evidence on this point is not at all conclusive.

On the other hand, the complainants deny that the word Durham was used at all before 1865 or 1866, either on the labels of Morris & Wright or of any of the successive firms which followed the original firm of Morris & Wright in the business at Durham's. If it was used, however, they claim the right to the exclusive use of it as successors and assignees of Morris, who bought out Wright's interest in the business of Morris & Wright. They insist, moreover, that Durham as descriptive of tobacco, is a geographical term, which first gained its significance just after the war, in 1865-66; that it derived its significance solely from the use of it by J. R. Green; and that, as Green's successors, they are entitled to the exclusive use of it. They patented a trademark in 1870 (No. 122), their patent describing their trademark as "painted on glazed paper, upon which is represented a side view of a Durham bull and the words 'Genuine Smoking Tobacco.'"

In 1871 a suit was brought in the Superior Court of North Carolina by W. T. Blackwell against W. A. Wright (*Blackwell v. Wright*, 73 N. C. 310), in which the complainant, claiming a right to the exclusive use of the word Durham as a descriptive term for his smoking tobacco, on the same label with his symbolic trademark of the side view of a short-horn bull, sought to enjoin the defendant Wright from using the word Durham as a description of his smoking tobacco upon a label similar in color, material, and general appearance, having on it the head and neck of a short-horn bull. The suit was a trademark suit, and the complaint contained no charge of fraud in deceiving the public,

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and no prayer for an injunction to prevent the use of a label deceptively assimilated to that of the complainant. The suit, after going to the Supreme Court of North Carolina, was dismissed on demurrer to the complaint, the demurrer being based on the ground that the complainant did not, by formal allegations of assignments, trace his title to the exclusive use of the trademark in question from J. R. Green.

In the same year a suit was brought in the United States Circuit Court for the Western District of Virginia, at Lynchburg, by W. T. Blackwell and J. S. Carr, partners, trading under the firm name of W. T. Blackwell, against L. L. Armistead. See *infra*, p. 163, and *Blackwell v. Armistead*, Browne on Trademarks, 510. In that suit the complainants claimed the exclusive right to use the trademark already described, including the word Durham and the side view of a short-horn bull; charged an infringement of it by Armistead, as assignee of William A. Wright, in the use of the label of Wright, also already described; and prayed an injunction against all further use of the last-named label. In this suit the complainants prevailed, and a perpetual injunction was granted; and the matters in controversy were afterwards compromised.

Upon this condition of facts, the complainants, W. T. Blackwell & Co., a firm now consisting of W. T. Blackwell, James R. Day, and Julian S. Carr, of Durham, N. C., have brought their bill into this court against W. E. Dibrell and W. W. Phillips, partners, doing business in Richmond, Va., under the firm name of W. E. Dibrell & Co. The complainants claim an exclusive right to use the trademark described in their patent (No. 122); they charge that the defendants are using the device and trademark which has been described as an imitation of their own and in infringement of their exclusive right; they allege that the defendants nowhere put their own name upon their labels, and that they disclose by such concealment an intention to defraud the complainants and the public generally; and they charge also that by the use of said label and trademark the defendants are practicing a fraud and deception by which the public are deluded, and induced to buy the said smoking tobacco as and for smoking tobacco made in Durham by the complainants. They charge

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also that the decree in the suit of *Blackwell v. Armistead* estops Wright and all others claiming under him from using the Wright label. The bill prays for an account and for a perpetual injunction.

The answer of defendants denies the right of complainants to the exclusive use of the word Durham in their label; denies that the Wright label is a fraudulent simulation of Blackwell's; founds their own title to use it upon the title of Wright, originating in 1860, and claimed to be still subsisting; and denies any intention to defraud the complainants or deceive the public. The answer also claims that Blackwell and W. T. Blackwell & Co. are estopped from claiming the exclusive use of the word Durham in their label by the decree of the Supreme Court of North Carolina in the case of *Blackwell v. Wright*.

Mr. Solicitor-General Samuel F. Phillips and W. A. Maury, of Washington; Mr. Legh R. Pace, of Richmond; Mr. John W. Daniel, of Lynchburg; and Messrs. Merriman, Fuller & Ashe, of North Carolina, appeared for the complainants; and Mr. W. D. Browne, of Washington; Mr. George Harding, of Philadelphia; and Messrs. Williams and Digges, of Lynchburg, and John O. Steger, of Richmond, appeared for the defendants.

The following opinion was delivered by

HUGHES, J.—It is useless to review all the points relied upon by counsel on each side in their able arguments in the cause. I shall consider only those questions upon which, in my judgment, the case really turns.

I shall first deal with the objection of estoppel, or *res judicata*, urged by each party against the other.

In order for one suit to constitute an estoppel upon any party to another suit, four conditions must coexist, viz.: 1st. There must be an identity of the cause of action. 2d. There must be an identity of parties to the suit. 3d. There must be an identity in the character or quality of the respective parties; and 4th. There must be an identity of the thing in question. See *Smith v. Turner*, 1 Hughes, 375.

These conditions of identity do not exist between the present case and either of the cases of *Blackwell v. Wright* or *Blackwell*

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*v. Armistead*. Those cases, therefore, do not operate as estoppels. Nor do they at all affect the one now under consideration, except so far as they are precedents of authority upon the principles which were decided by them. In *Blackwell v. Wright* the decision was upon demurrer to the complaint; and, in technical effect, it was only that Blackwell had not traced his title to his trademark by proper allegations from Green; while, on the merits, the decision went only so far as to determine that the allegations of the complaint did not make a case of exclusive right to the trademark for the plaintiff. The complaint there did not charge that Wright's use of the trademark was a fraud upon the public, or pray for an injunction on that ground. None of these allegations can be made of the complainants' bill in this case.

In *Blackwell v. Armistead* it is true that the decision was upon the principal questions raised in the present case; but owing to the character of the pleadings it was based upon grounds narrower and more technical than those upon which I propose to found the present decision. That suit was a trademark case. This is more, and involves the question of the fraudulent use of a trademark, to the injury of the public at large, as well as of the complainants. Therefore, neither of the two cases which have been urged in estoppel governs even as precedents the present one, which I shall now proceed to consider.

Two questions arise as to the pleadings and evidence:

1st. The first is, whether the defendants have any right at all to use a label in which the word Durham is used as descriptive of smoking tobacco, and in which the figure of a short-horn bull is used as a symbol of the word Durham; their right to the exclusive use of it not being claimed.

2d. The second question is, whether the complainants have a right to the exclusive use of such a label.

In considering the first question, I shall, for the sake of brevity, speak of the defendants' right to use the label described as Wright's, inasmuch as their title to use such a label could come, under the evidence in this cause, only from Wright.

Has, then, Wright, or his assignees, now, or have they at any time since 1865, had any right at all to use a label having in it the word Durham, as descriptive of smoking tobacco, and hav-

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ing also in it the figure of a short-horn bull, or any part of that animal, as a symbol of the word Durham? Of course their title to use the word and the symbol stands on the same basis; if it falls as to the word it falls also as to the symbol of the word.

There can be no doubt of Green's original right to the exclusive use of the full figure of a short-horn bull as a trademark. That is virtually conceded by Wright himself in his testimony.

As to the word Durham as descriptive of smoking tobacco, the right to use it is in this cause claimed by defendants, who do business in Richmond, Va., and who advertise and sell, *as* Durham smoking tobacco, tobacco which they put up in Richmond, and which they obtain from any source available to them other than Durham.

Such a practice necessarily deceives every purchaser who, in purchasing this Durham smoking tobacco, believes that he is purchasing the fine tobacco put up in the place of that name in North Carolina. Dibrell & Co. claim solely from Wright. What then, is Wright's title under which this deception comes about?

He claims that he did not, in 1861, sell his right in the label used by Morris & Wright, to his partner Morris, when he sold all his interest in the business. He claims that he derived the word Durham and the device of a short-horn bull from a Durham mustard box. He pretends that neither the word nor the device, as invented and used by him, was descriptive or geographical in purport, but that they were arbitrary symbols, and that having been so at the beginning he and his assignees have still a right to use them.

The objection to this pretension lies not merely in the improbability of the origin of the use of the word Durham and its symbol which Wright recounts, or in the unsatisfactory character of the evidence on which his original right to use the word and its symbol is based, or in the presumption that when he sold in 1861 he sold all his interest to Morris; but it lies also in these two facts, viz.: 1st. That whatever title Wright had to the use of the word Durham after leaving Morris, in or about the year 1861, was lost by non-use, his disuse continuing through a period of eight or nine years after he left the vicinity of Durham's; and, 2d, That during this long period of disuse the

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brand of Durham smoking tobacco acquired a definite and peculiar meaning with dealers and consumers ; the word Durham ceasing to be (even if it ever was) a mere arbitrary term, and having obtained a geographical signification as to the place—Durham, and a commercial signification as to the article of tobacco manufactured at Durham. During the interval of disuse, the phrase Durham tobacco had come to indicate that portion of the product of a particular region of country which was marketed at the place called Durham's or Durham. The phrase "Durham Smoking Tobacco" had come to indicate in all markets, and among all dealers and consumers, the smoking tobacco marketed and manufactured at this place of Durham, in North Carolina.

It was not until after this signification had attached to the phrase that Wright adopted (or, as he pretends, returned to) the use of the word Durham, which he had abandoned. If, as he claims, the word Durham had in fact been used by him at first as an arbitrary trademark, and if, in addition, he had continued the use of it without interruption down to 1866 and on to the present time, that use by him would itself have prevented the other and local signification from attaching to the brand and word ; for in that case, Durham smoking tobacco would have described two tobaccos : first, those marked and manufactured at Durham, and, second, those sprinkled with Wright's "Durham" juice.

But he did abandon its use ; he stood by for some eight years and allowed a peculiar commercial and local signification to attach to the word Durham as descriptive of smoking tobacco, and not until after that local and commercial signification had come to identify the tobacco labelled with the word all over the country as coming from a particular region and as having a particular quality, and not until after this brand had come to be worth thousands of dollars to the manufacturers of this particular tobacco at this particular place, did he begin or resume the use of the device, which he claims to have derived from the mustard can. To put that word now on tobaccos grown elsewhere than at Durham, even though sprinkled with his "Durham" decoction, is, in the light of the evidence in this case, to pass them off as tobaccos coming from Durham, and is to deceive and

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defraud all who deal in and purchase the commodity as smoking tobacco from Durham. It has so come to pass from Wright's non-use for eight years, that to manufacture and sell other tobaccos at all and brand them with the word Durham is to deceive the public, no matter what liquid may be used on them. Under existing circumstances, to manufacture even Durham tobaccos elsewhere than at Durham, and to sprinkle them with a foreign liquid, is to deceive the public generally, and those who put up the genuine article at that place particularly. The manufacture of these tobaccos at that place is the best guarantee which the public and the trade can have that the commercial article labelled Durham Smoking Tobacco, and sold in all markets, is genuine, and prepared under the fewest temptations to adulteration.

That the right to use a trademark may be lost by abandonment or disuse is too clear to need argument or the support of authority. The law of the subject is stated in the chapter on Abandonment, sections 674 to 691, of Brown on Trademarks.

It cannot be pretended that in Green's first use of his label, in 1865 or 1866, he had any intention of taking up an old label at second hand, or had any knowledge or belief that Wright, or any one else, could claim the label which he then devised as entirely novel and peculiar. The field was open to his enterprise and invention, for establishing his business and inventing his label and trademark just as he did.

Green's adoption in 1865 or '66 of the word Durham, as descriptive of the best tobacco of North Carolina put up by him, and of the bull as a symbol of the word, was naturally suggested by the facts of his business. If Wright had ever had such a label, which I do not feel that the evidence warrants us to believe, it was in 1865-66 unknown in Durham; had been abandoned even then for some four years; had never signified anything but tobacco sprinkled with Wright's decoction; and had never borne the valuable and creditable commercial signification which the climate and soil and good husbandry of North Carolina and the enterprise of a Durham manufacturer were about to give it.

By the several facts, of Wright's non-user of the label for eight

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years; of its never having, even as claimed by him, had any but an arbitrary significance as tobacco sprinkled with a species of artificial treacle; and of its having during a long period of disuse acquired a new, wholly different, and well and widely known geographical and commercial signification, Wright lost his right of using the label altogether. His use of it now operates necessarily to mislead and deceive the public as to the source of production and quality of the article bearing the label, thereby defrauding them; and the court will therefore make a decree of perpetual injunction against the further use of it.

As to the second question, whether Blackwell & Co. have an exclusive right to the use of the label described in the pleading, I think on the evidence submitted that they have. We have no hesitation in so deciding as against the defendant in this cause, and will incorporate in the decree of the court an order for an account of profits against the defendant as prayed for in the bill.

The label and trademark of complainants was established in 1865 by J. R. Green. His business and that of his successors built up the insignificant and obscure place, Durham's Station, into the flourishing town "Durham." The town grew up during the first four or five years of the use of the label, and owed its growth in chief part to the business indicated by the label. In that respect the case is similar to that of the trademark Cocaine, *Burnett v. Phalon*, 3 Keyes, 394. In respect to the commercial article bearing the geographical name, it is similar to that of the Akron cement, *Newman v. Alwood*, 51 New York, 189. The right of the complainants in this case has the double strength of that of the proprietors of the trademark Cocaine, and of that of the Akron cement. The use of the principal characteristics of their trademark by manufacturers not conducting their business at Durham is a deception put upon the public, and may be enjoined on that ground alone, irrespectively of the trademark right. The use of the trademark invented by Green under which he and his successors built up his trade, and built up the town of Durham, like the use of the word Akron to the proprietors of the commercial article bearing that name, belongs exclusively to

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the successors of Green, and the court should secure its exclusive use to them.

I had some doubt whether in a litigation between Blackwell & Co., on the one hand, and defendants not doing business in the town of Durham on the other, it was competent for the court to decree that Blackwell & Co. have the exclusive right to the use of the word and symbol characterizing their trademark; but it is certainly competent for us to render a decree responsive to the issues made up by the allegations and denials of the bill and answer, one of which is this right of exclusive use claimed by Blackwell & Co. As between the complainants and defendants in this suit, therefore, we may so decree, even though other persons than the defendants to this record be not bound by the decree.

Judge Bond concurred in the decree, but is not responsible for every position taken in the opinion.

This trademark had been the subject of a previous suit in the Circuit Court of the Western District of Virginia. The following was the decision of Judge Rives on similar questions to those decided as just reported by the Circuit Court of the Eastern District of Virginia:

*United States Circuit Court, Western District of Virginia, at  
Lynchburg, March Term, 1872.*

W. T. BLACKWELL AND J. S. CARR, PARTNERS UNDER THE  
STYLE OF W. T. BLACKWELL, v. L. L. ARMISTEAD.

IN chancery.

RIVES, J.—The preliminary injunction in this case was founded on the statements in the bill. In pursuance of the notice

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required by statute, the defendant contested its emanation upon *ex parte* affidavits assailing the title of the plaintiffs. But in that incipient state of the proceedings it would not have been proper, if at all practicable, to pass upon the merits of their defence; and the only question there was, whether the case as presented by the bill and affected by this adverse testimony, was still such as to require this *stay* till the merits of the controversy could be developed by further pleading and testimony. The propriety of this interposition by the court will scarcely be now questioned, as these further proceedings have shown the case to be one of perplexity and doubt.

The pleadings have now been perfected. The defendant's answer was duly filed, issue taken upon it, and the cause set down for final hearing. A vast volume of testimony has also been taken, some of it contradictory, and a vast deal of it irrelevant and impertinent. It is to be regretted that the zeal of counsel or the anxiety of parties should have so augmented the bulk of this testimony as to make a needlessly expensive record of it, and to devolve upon all engaged in its examination a wearisome amount of unprofitable reading. Still it is a subject of congratulation that the cause is now fully developed in all its aspects and bearings, and has been argued with a discriminating force and fullness of research alike masterly and instructive, and calculated to produce settled convictions one way or the other.

Our first task is to acquire accurate and precise ideas of the issues made by the pleadings. If this be done, and then the law be properly applied, it seems to me we can reach a safe conclusion almost without resorting to the voluminous testimony. The plaintiffs claim a trademark, designed in 1865 or 1866, and continuously used ever since. It is *exemplified* and made a part of their bill. The descriptive terms are "Genuine Durham Smoking Tobacco," and the symbol or device is the side view of a Durham bull. They assert that this trademark has been violated by the defendant in using, under date of January, 1871, these terms: "The Durham Smoking Tobacco," and the symbol or device of "a bull's head," with a note of the sale to the defendant of Wright's patent for the manufacture of "Genuine Durham Smoking Tobacco." This latter trademark of the de-

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fendant is also *exemplified* in the bill and placed in juxtaposition and contrast with the plaintiffs' trademark.

The answer, while calling for full proof of the allegations of the bill, does not directly deny this statement, but rests the defence upon three chief grounds: 1. The prior use of this trademark by Wright (under whom the defendant claims) as far back as 1860. 2. That the defendant's trademark is not an infringement of the plaintiff's, but is wholly dissimilar; and, 3. That the plaintiffs, by fraudulent representations in the premises, have deprived themselves of all equitable assistance.

The main contest is considered by all parties and the counsel in this case to rest on the *priority* in the use of this disputed trademark. The defendant does not pretend that Wright, under whom he claims, ever used the identical trademark set up by the plaintiffs. On the contrary, he takes especial pains to show that he placed no particular value on the term "Durham," which he now asserts belongs in common to his and plaintiffs' brands. The discovery which he had made, and for which he seeks protection, was his preparation for a mode of treating smoking tobacco, so as to mitigate its noxious qualities and impart to it an agreeable flavor. This is the merit he claims; this the process he has patented. The testimony and the answer concur in proving that the whole merit of this smoking tobacco, and its celebrity, were due to the use of the *flavoring* he gave his tobacco. He was confessedly the first to commence its manufacture at Durham's Station. There was nothing in the locality he could have reasonably counted upon to commend his manufacture to the public. But, if we are to credit the defendant's answer and his testimony in this cause, it was his discovery of the flavoring compound on which he plumed himself. Accordingly, it was this which he emblazoned on his stencil plate. Take his own statement for the present, and what was his brand? "*Best Spanish Flavored Durham Smoking Tobacco.*" What, in view of the pleadings and evidence in this cause, is the characteristic, the vital element of this trademark? Manifestly, "*Best Spanish Flavorel.*" That was the only conspicuous and discriminating element in the trademark. "Durham," if indeed a part of it, was, upon the defendant's own showing, subordinate and insignificant. Now, the

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plaintiffs concede in the fullest manner Wright's superior title to the use and brand of his flavoring compound, and disclaim in their process any infringement of it; nor does it appear there has been any, nor, indeed, any formal complaint of it.

The pretension of the defendant, then, amounts to this: that because, in 1860, he branded his smoking tobacco "*Best Spanish Flavored Durham*," wholly because of the mode in which he flavored it, no subsequent manufacturer of the article at Durham, without the use of his process, shall brand his as "*Genuine Durham Smoking Tobacco*" with a symbol which he never used. Their reply is that, under the circumstances of his use of the name "Durham," there was nothing in it so descriptive as to restrain succeeding manufacturers at the same place from engrafting it on their brand, so long as they laid no claim to nor made any use of his "*Best Spanish Flavored*" compound, which he, indeed, appropriated by this first and original use of this only conspicuous term on his stencil-plate in 1860-61. It must be remembered that Wright was only in the infancy of this manufacture at Durham, and that others followed and developed it till the plaintiffs instituted their brand in 1865 or 1866.

Conceding, then, all the defendant claims by virtue of his purchase from Wright, he fails, in my opinion, to rebut the plaintiffs' title by proving a brand as used by Wright previously, wherein "*Best Spanish Flavored*" was the distinguishing attribute, and "Durham," under the circumstances at that time, a mere unmeaning *incident*. Thus stands this point in the light of the pleadings alone, the allegations of the plaintiffs on the one hand, and the denials and defences of the defendant on the other.

The testimony as to the fact whether the term "Durham" was ever upon the stencil-plate of Morris & Wright is contradictory. But in my mind it preponderates against the existence of that name in that brand. Counsel have adroitly insisted that the testimony against it is negative, and cannot from its nature, however commanding, overcome clear affirmative proofs. The proposition of law involved in the statement is correct; but the whole inquiry is into a fact, namely, What was the stencil used by Morris & Wright? Some, on the one hand, who had used it, declare with emphasis it was "*Morris & Wright's Best Spanish*

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*Flavored Smoking Tobacco;*” others, but mainly Wright and his two sons—the latter at the time but boys—stated it as “*Morris & Wright’s Best Spanish Flavored DURHAM Tobacco.*” The proofs, therefore, on both sides are equally affirmative. If, then, it be left in doubt, we must look to the probabilities of the case to turn the scales. What motive could have existed with Wright, all whose reliance was upon the merits of his flavoring compound, to invoke the name of a small, thriftless station on a railroad, settled by only two or three families, with a store and this factory, to invoke its name to give celebrity to the *preparation* to which he solely looked for his reward? It seems to me extremely improbable, upon ordinary grounds of reason and human action, to suppose that he used “*Durham*” on his stencil at all. On comparing and weighing the testimony on both sides, I am constrained to adopt the conclusion that he did not. Neither he nor his vendee, therefore, have any claim to contest, under this state of the evidence, the validity of the plaintiffs’ trademark and their original and paramount title thereto.

It cannot be denied that it is abundantly proven in this cause, that the manufacture of Morris & Wright, and of those who succeeded them at Durham, was known, called, and distinguished in the market as “*Durham*” smoking tobacco. It is on this notorious fact in the cause that the able and ingenious argument has been raised that the public, by its voice, may appropriate and consecrate to an individual property in a designation by which he may choose to denote any product of his industry. But I can find no warrant for such proposition in the law on this subject. On the contrary, it is distinctly laid down by the authorities, that it is only *the actual use* of the mark, device, or symbol by the dealer which entitles him to it, and gives him the right to be protected in the enjoyment of it.

The doctrine on this subject has grown with commerce, and has assumed the form and title of a distinct body of law under the moulding hand of able judges, who have sought in their decisions to establish its guiding principle, and of acute commentators and essayists, who have exerted the powers of a superior analysis and discrimination to extricate from doubt the true maxims of this beneficent code of business ethics.

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So much of it as is necessary for our present inquiry is comprehended in a single proposition. It is the *seminal* principle of the whole doctrine. The simple statement of it is, that the dealer has *property* in his trademark. This is allowed him because of the right which every man has to the rewards of his industry and the fruits of his discovery, and because of the wrong of permitting one man to use as his own that which belongs to another. In regard to the latter, it may be well said that any imitation of a trademark, calculated to deceive the unwary customer, differs from an absolute forgery, not in the nature, but rather in the extent of the injury. The dissimilarity to the expert wholesale dealer may be such as to save him from the imposition, but too slight, and that perhaps by design, to diminish sales to the incautious purchaser. But upon the success of fraud depends, ultimately, the extent of the injury. Let the spurious fabrication meet the same sale among private and individual consumers as the genuine article, and the wholesale dealer loses all motive for the exercise of his skill in detection, when he, perhaps, can reap better profits from the spurious, and therefore cheaper, than from the genuine article. In this way a simulated trademark may work the same mischief, and to the same extent as a forgery, defying detection at the hands of the *expert*.

With this view of the law I proceed to examine the *second* ground of defence, that the defendant has not infringed the trademark of the plaintiffs. This is scarcely the subject of argument. It must be referred to ocular examination and decision. Place the respective trademarks side by side, contrast the labels, the words, and the devices, and each one's vision must determine for himself whether the imitation is such as to deceive the unpracticed and unwary customer. It matters not now, in the critical inspection of them, and aided by ingenious counsel, we can clearly discern differences between the two. The true question is, whether, taking the "*tout ensemble*," Armistead's trademark might not pass with the unwary for that of William L. Blackwell & Co.; and if that be so, the wrong is done, and the title of the latter to be protected by this court is consummated. For my part, I do not see how trademarks so similar could escape being confounded in the market. One reads, "*Genuine Dur-*

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*ham Smoking Tobacco;*" the other, "*The Durham Smoking Tobacco.*" This use of the definite article makes these phrases equivalent. To remove all doubt, and aid the deception, in the note of the sale of the patent to Armistead, it reads, for "Genuine Durham Smoking Tobacco." Thus the language, to this extent, of the label is identical. Now, as to the symbols, or devices; one is the side view of the Durham bull; the other, that of his head, on a medallion. The one symbolizes, by a part, the name "*Durham*" as effectually as the other does by the whole. The color of the paper is also the same. Whether this *simulation* be the product of accident or design does not matter. It is the province of this court to suppress it in either case. It is a little curious, however, to note that Wright's first label, at Liberty or in Bedford, was wholly different; and that after his son had seen plaintiffs' trademark in Kentucky, and after his return to his father, the present trademark, as transferred to the defendant, was adopted by Wright.

The third and last ground of defence is that the plaintiffs have forfeited their right to relief in this court by reason of their false and fraudulent pretensions. This is upon the ancient and familiar principle that those who do iniquity must not ask nor expect equity. It is worthy of all acceptance. It is a hoary maxim, hallowed by its age, and, unlike some other sacred antiquities, as yet unassailed by the spirit of change or reckless progress; I adhere to it. But the charges are serious and demand investigation.

The first is that the plaintiffs sent out business envelopes and business cards, giving the year 1860 as the date of the establishment of their enterprise. In the absence of explanation this might well impugn the *bona fides* of the plaintiffs, as in their bill they fix it no earlier than 1865. But was this statement by mistake or design? Have the plaintiffs failed to account for it? A junior member of the firm was examined, and showed how it all occurred *innocently*, and without intent to deceive. He ordered the printing and gave the date; soon after the packages were received and opened in the presence of Dr. Blackwell. The latter saw the error of date and corrected it; and the witness stated that he proceeded to correct the misdate by writing the

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figure (5) over the cipher in 1860, so as to make the date 1865, as corrected by Dr. Blackwell, but that some might have gone out before the correction. The exhibits made by the defendant of these envelopes and cards corroborate rather than conflict with the witness. *That* should not be taken for *fraud* which is proved by an unimpeached witness to have been a *mistake* on his part. Besides there was no reasonable motive for such misrepresentation; the plaintiffs had nothing to gain by it, but much to lose, on the hypothesis of the counsel for the defendant.

The next is a charge of falsehood in representing that the label was secured by copyright. There is not a particle of proof to that effect. Argument and ridicule alone are relied upon to show the inapplicability and absurdity of a copyright for such a print. The language of the statute is certainly comprehensive enough to embrace a label of this kind. Act of July 8th, 1870, § 86, United States Statutes at Large, vol. 16, p. 212. The object of such copyright is to secure to "the author, inventor, or designer" of any such "*print*" the sole liberty of printing and vending the same. It forbids the surreptitious use and illegal sale of his labels. This is a perfectly legitimate resort to copyright in such a case and for such a purpose. It would, indeed, be absurd and ridiculous if the object were, as sarcastically portrayed by counsel, to protect the designer against the unlawful multiplication of such *ycleped* works of art. The dealer seeks merely by his copyright to keep the printing and vending of his labels in his own hands and under his control. It has been resorted to in other cases, as, for instance, the case of *Wolfe v. Gould*, Cox's American Trademark Cases, 227, for the label of "*Schiedam Schnapps*." There is nothing unreasonable or incredible in this claim of the plaintiffs to a *copyright* for their label, nor is there anything in the testimony or the law to lead us to discredit it and brand it as a falsehood.

It seems to me, therefore, that both these charges are unfounded. They spring from the heat of forensic contests. They pertain to the polemics of the bar. Their effect is to provoke recrimination. Hence, the plaintiffs' counsel retaliate by imputing *falsehood* to the defendant in dating this purchase of Wright 1st of January, when he had stated in his answer he would not

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buy till he had ascertained his title by certificates, and those very certificates bore the subsequent date of the 6th of that month. The imputation seems plausible, but the transaction is susceptible of a more charitable construction, which I deem it my duty to put upon it. Dates are commonly immaterial, and often misapplied in business transactions. The main fact is doubtless correctly stated by the defendant, though he is made himself to confront it by a *mistaken* date.

I am glad, therefore, to have it in my power to state that there is nothing in this cause to affect the fair fame of the parties plaintiff or defendant. They are doubtless respectable men, and enterprising manufacturers of tobacco in their respective communities. They are engaged, as I believe, in the honest pursuit of their rights as they respectively understand them. The defendant has acted on the information of another, under whom he claims. He has obeyed the order of this court. The only thing I have to regret is, that the same deference was not paid by another manufacturer, who, though no party to this suit, could not have been ignorant of it from his near relation to the defendant. But the plaintiffs have not chosen to bring him before this court, save by proving his acts in the use of the simulated mark, notwithstanding the injunction upon his brother.

I am sure the plaintiffs and defendant, as enterprising dealers, will find their ultimate interests subserved by the doctrine I have sought to expound and maintain as to their trademarks. Whoever may now be the loser by it may soon have occasion to invoke it for his own protection, and they whose rights are now sustained, must learn thereby to respect those of other competitors in their business, at the same time that they take encouragement to themselves from their present success. All intelligent men engaged in manufactures and other enterprises must sooner or later become reconciled to losses in whatever favored quarter they may fall, that may be fairly viewed as penalties for the infraction, however unintentional, of laws well settled, designed, and calculated to vindicate the honor, advance the morals, and promote the interests of trade.

For these reasons I decree the perpetuation of the injunction,

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and order an account to be taken by a master of the profits made by the defendant from his sales under the simulated trademark aforesaid.

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*United States Circuit Court, Eastern District of Virginia.*

OPINION FILED APRIL, 1879.

THOMAS SAYLES v. RICHMOND, FREDERICKSBURG AND POTOMAC RAILROAD COMPANY.

PATENT CASE—LIMITATIONS—JURISDICTION—BILL FOR PROFITS AFTER PATENT EXPIRED.

1. *Limitations.*—Where a patent has been granted for fourteen years and extended for seven years, a suit may be brought against an infringer for profits that accrued at any time during the twenty-one years, if brought within six (now five) years after the extended patent expires.
2. *Jurisdiction.*—The complainant and defendant being citizens of different States, the jurisdiction of the court is as a court of equity. It is doubted whether the United States Circuit Court has jurisdiction in patent cases, except by injunction, where the parties are citizens of the same State.
3. *No Jurisdiction in Equity.*—In this case it is sought to recover in equity profits resulting to the defendant from using, through a series of years, a mechanical invention without the owner's consent or authority. These profits do not consist in specific sums of money received by the defendant in so using the invention. They simply consist in the advantage and convenience derived from using them. This advantage is a matter of estimation as due in the lump. It is not a matter of accounts, and therefore a bill cannot be sustained for an account; where there is an adequate common-law remedy, equity cannot take jurisdiction of a bill for profits arising from the use of a patent solely on the ground of constructive trusteeship.

THIS bill is brought to recover profits against the defendant from its unauthorized use of the complainant's improved railroad car-brake (known as Tanner's brake) for a number of years before the patent expired. The brake was invented by two men, Thompson and Bachelder, and by them the invention was assigned to Tanner in April, 1852. The brake was patented by

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Tanner in July, 1852; Tanner assigned it to the complainant here, Sayles, in 1854. The patent was renewed for seven years from July, 1866. It finally expired on the 6th of July, 1873. Sayles filed this bill of complaint on the 8th January, 1879.

The bill charges the unlawful use of the brake by the defendant from July 6th, 1856, to July, 1873. It prays for a discovery of the full amount of profits accrued to the company from such use of the brake; also for an account of profits; and finally that the defendant may be made to pay this amount of profits when ascertained.

The bill is not in form a bill for discovery or for account. It, of course, is not a bill for an injunction, having been filed after the patent right of Sayles had finally expired.

The defendant demurs to the bill, setting out as one ground of demurrer, that the complainant is barred from recovery by the statute of limitations; and, as another ground, that the bill does not make a case for relief within the jurisdiction of a court of equity.

The following is the opinion of the court:

HUGHES, J.—It is only necessary for me to pass on the two questions of limitation and of jurisdiction.

First, as to the statute of limitations: The 34th section of the Judiciary Act of 1789 (section 721 of the Revised Statutes of the United States) is the only general statute of limitations known in Federal legislation. In providing that the laws of the several States shall be the rules of decision in trials at common law in courts of the United States, except where treaties or acts of Congress otherwise provide, Congress virtually adopted the statute of limitation of each State as the limitation of actions brought in the United States courts held in that State. This point is so thoroughly settled that it is useless for me to cite authorities on the subject.

But this section excepts in terms cases in which any acts of Congress may provide other rules of decision. And Congress did enact a special statute of limitations as to patents, in section 55 of the act of July 8th, 1870, entitled "An act to revise, amend, and consolidate the statutes relating to patents and copyrights"

(vol. 16, p. 206, United States Statutes at Large), the concluding clause of which declared that all actions should be brought "within the term of the patent, or within six years after the expiration thereof."

This clause was not repealed until the 20th June, 1874, when it was virtually repealed by section 5596 of the Revised Statutes of the United States, in having been omitted in the revision from sections 4919 and 4921, which latter sections in other respects embodied sections 59 and 55 of the act of 1870. This repeal gave to the complainant the right to sue, under sections 721, within five years from June 20th, 1874: *Sohn v. Waterson*, 17 Wallace, 596; *Ross v. Duval*, 13 Pet. 62; and *Lewis v. Lewis*, 7 How. 778; and the present suit was in fact brought within that period.

The suit is therefore undoubtedly in time as to profits made by the defendant during the period of the extension of the patent, July, 1866, to July, 1873. The only question admitting of doubt is, whether or not it is brought in time to cover profits for the fourteen years extending from 1852 to 1866.

Section 66 of the act of 1870 (section 4927 of the Revised Statutes) provides, in its last clause, that when a patent shall be extended for seven years after the expiration of the first period for which it was granted, it "shall have the same effect in law as though it had originally been granted for twenty-one years."

I have given all the attention of which I am capable to the ingenious argument of defendant's counsel in their contention that, in spite of this language, the limitation applied severally: first, to the fourteen years, barring all claims accruing specifically in that period; and, second, to the seven years, barring claims accruing afterwards in that period; so that, if a suit is brought, as this was, within six years after the close of the latter period, it would be good to cover claims accruing therein, but would not be good to cover claims which had accrued anterior thereto.

But it is too plain for doubt, in my mind, that the law, which is certainly written as has been quoted, really means what it declares, when it provides that the renewed patent "shall have the same effect in law as though it had been originally granted for

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twenty-one years." The necessary effect of this language is to consolidate the seven and fourteen years of the two patents into one term, as under one patent, and to make the limitation apply to the period of twenty-one years as a single integral term. Indeed, I can well imagine it to have been one of the objects of section 66 of the act of 1870, to establish a plain intelligible period of limitation, to wit: six years after one single integral period of twenty-one years, rather than to enact a complicated statute of limitations, depending upon two periods of duration, two sets of dates, and two classes of claims.

I cannot, therefore, sustain the demurrer; so far as it rests upon this ground I must hold that the claim of the complainant in this suit is not barred.

I come, therefore, to the more important question, whether the complainant's bill makes a case within the jurisdiction of a court of equity.

This suit being one in which complainant and defendant are citizens of different States, and the jurisdiction of the court extending here to any case which may fall within its general jurisdiction as a court of equity, its power here is not a mere statutory jurisdiction confined to cases arising under patent laws, but it is the general power of an equity court. I doubt whether under section 55 of the act of 1870, or section 4921 of the Revised Statutes, the United States Circuit Courts have jurisdiction in patent cases, except by injunction, where the parties are citizens of the same State. In cases where the jurisdiction is merely statutory, and would not exist but for the acts of Congress giving special jurisdiction in patent cases, I doubt whether these courts could entertain suits in equity except by injunction. It is a well-settled canon of construction that jurisdictional legislation must be strictly construed; and I see nothing in the letter of section 4921, relating to patent suits in equity, to authorize any other proceeding in them by the Circuit Courts as courts of equity but by injunction, carrying with it, of course, proceedings incident to injunction. If so, the term of this complainant's patent having expired, and there being no case for an injunction, we have no jurisdiction in this suit, merely as a patent suit, under section 4921.

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This proposition, however, does not affect the present case. We are proceeding under the general powers of an equity court, and have jurisdiction of the case (if it can otherwise be entertained) by virtue of the parties complainant and defendant being citizens of different States.

It was not contended in the argument at bar that the bill in this case can be entertained as a bill for discovery. In fact, it is not framed on that theory, and does not contain the averments necessary to constitute it such a bill. It does not aver that the information it seeks rests alone in the knowledge of the defendant. The defendant is a corporation having no conscience to probe and is incapable of taking an oath. It can give information only through its officers, and these may all be summoned, and may testify, as ordinary witnesses. A "discovery" (in the technical sense) by the defendant is not necessary to the plaintiff's relief. There is, therefore, no case for a discovery made in this bill as a bill of discovery.

Nor is the bill framed on the theory and in the form of an ordinary bill of account.

What it seeks is to recover profits resulting to the defendant from using, through a series of years, a mechanical invention without the owner's consent or authority. These profits do not consist in specific sums of money received by the defendant in so using the invention; they simply consist in the advantage and convenience which the defendant derived from using an ingenious piece of mechanism.

What this advantage was is a matter of estimate by experts or men of practical experience, as due in the lump. It is not a matter of items, of money and accounts, of bookkeeping, of buying and selling, of mutual dealing in goods or money. Nor is there any mutuality of account. If defendant's profits consisted of items at all, the items were all on one side. Because this is not matter of account, because there was no mutuality of accounts, and because the case is not one for discovery, it follows that the bill cannot be entertained as a bill for an account as such; indeed, in the argument at bar, the complainant's counsel did not claim jurisdiction on that ground.

In truth, the argument at bar was devoted almost wholly to

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the question whether or not the profits, derived by the defendant as claimed by the bill, could be treated as trust funds; whether, as to them, the defendant was not a trustee *de son tort*; and whether the jurisdiction of equity to look after these profits as a trust fund, and to compel a discovery, an account and a restitution of them, as a trust fund, could be sustained.

This question has never been adjudicated by the Supreme Court of the United States. Complainant's counsel cites decisions from other courts, from which he thinks it is *inferable* that courts of equity may take jurisdiction of suits to recover from infringers profits derived from patented inventions, on the ground of constructive trusteeship; and he refers to several recent conflicting decisions of the United States Circuit Courts on this question.

But I think I may safely proceed, as if the question were still an open one. I do not think that the reported cases cited by the complainant's counsel throw any clear light on the question, for they do not bear upon it.

I do not perceive that the case of *Crosby v. The Derby Gas-Light Company*, 3 Mylne & Craig, 430, shows anything which should affect the case at bar. It is the report of the second hearing of the case, and is but a partial report. The only question was upon the construction of a former decree. It does not appear that the bill was not for an injunction, among other things. In a footnote, the report of the case on an appeal from the first decree is mis-cited as in 4 *Mylne v. Keen*, 72. I believe there is no such volume, and I have been unable to correct the reference or find the case.

The case of *Livingston v. Woodworth*, 15 Howard, 546, related to a planing machine, and was an injunction suit, in which nothing was decided except that the actual profits of an infringer of a patent could be recovered against the infringer as an involuntary trustee; but nothing was said on the subject in the decision of the court. There was no question of jurisdiction in the case.

In *Cowing v. Rumsey*, 8 Blatch. 38, which related to a cylinder polisher, and was an action on the case, no question of jurisdiction arose. The judge there merely made an incidental remark, *passim*, to the effect that an infringer of a patent might be

treated as a trustee in respect to profits derived by him from the use of the patent.

In *Burdell v. Denig*, 2 Otto, 716, which related to a sewing-machine, and was an action at law to recover damages from an infringer of a patent, and where jurisdiction was not in contest, Mr. Justice Miller incidentally said that damages might be recovered at law; but that profits were the measure of recovery in equity, on the theory that the infringer might be treated as a trustee.

In *Birdsall v. Coolidge*, 3 Otto, 68, which related to a machine for amalgamating gold and silver, and was an action at law, Mr. Justice Clifford made a remark that profits might be recovered in equity by considering the infringer of the patent as trustee for the patentee.

The question of jurisdiction did not arise in any one of these cases. Much less did the court in a single instance intimate, in the remotest manner, that notwithstanding the existence of an adequate common-law remedy, equity could take jurisdiction of a bill for profits arising from the use of a patent, solely on the ground of constructive trusteeship.

I have looked through the reports in vain for any direct authority for such a jurisdiction. There is such a thing known in equity jurisprudence as a trustee *de son tort*; but in every mention of such a trustee in the books, the property in respect to which a person has been regarded as a trustee *de son tort* has possessed, before the interference with it, the character of fiduciary property. I think it clear law, that it is only in respect to property already subject to a trust and stamped with the fiduciary character that a person can become a trustee *de son tort*.

In the present case if the assignment of the patent from Tanner to Sayles had been in trust, for the benefit of beneficiaries recognized in law as such, and Sayles were here suing for the trust funds, for the benefit of such beneficiaries, the defendant might, I suppose, upon the teaching of the authorities on the subject, be treated as a trustee *de son tort*, and be sued in equity.

But I think that it may safely be held, that in any case of constructive trusteeship the character of trustee *de son tort* does not

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attach in such manner as to give equitable jurisdiction over him, unless the property with which he interfered was already trust property when the interference occurred.

The defendant here, therefore, is not a trustee *de son tort*, nor suable as such in equity.

This much being clear, let us now suppose the case of a person who takes possession of and uses another's horse, wagon and team, or threshing machine, without his knowledge, consent, or authority. In such a case the law provides common-law remedies, in which the defendant is afforded the constitutional right of a trial by jury. In such a case the owner may recover damages in trespass for the tort; or he may waive the tort, and sue in assumpsit, on the implied promise to pay what is equitably due for the use and possession of the property. Will it be contended that a bill in equity would lie in such a case, on the theory that the wrongdoer was a trustee *de son tort*, or trustee at all? Yet the theory of an implied promise to pay what is equitably due, is, except in name and form, identical with the theory of trusteeship, which is, that the wrongdoer is custodian of the money so promised. The action of assumpsit in such a case is based upon the theory, that the wrongdoer has impliedly promised to pay what *ex quo et bono* is a fair equivalent for the use of the property. He is in law treated as a fiduciary in custody of another's property. But though this theory of trusteeship (for it is nothing else) is as old as the doctrine of assumpsit, no one has ever contended until lately that such a mere theory, employed by judges as a means of explaining by analogy the promise which they derive from the relation of the defendant to the property he has used, may be employed as the basis of a new departure in equity practice, and of an indefinite extension of the equity jurisdiction, in derogation of the common-law and constitutional right of trial by jury.

The case I have supposed is, in principle, precisely the case we have at bar; for there is no magical quality in the property of a patentee in his patent to distinguish this case from the one just supposed, where ordinary property has been taken and used without the owner's consent.

We are not dealing with the present case by virtue of the peculiar jurisdiction of this court in patent cases, but under its general jurisdiction as a court of equity. The defendant has used the complainant's property, and the fact that the property used is a patent, does not at all affect the question of jurisdiction. The patent was not trust property when the defendant began to use it, and therefore the defendant does not bear to it the relation of trustee *de son tort*.

The act of the defendant was nothing but the simple one of a person taking and using another's property without authority, to his own advantage, and incurring a liability to compensate the owner for such use of the property. The case is in principle precisely identical with that of such a use of a horse, or a boat, or a wagon and team, or threshing machine, giving a right of action in assumpsit, and until recently I have never known it to be contended that compensation for such use could be sued for in equity, "on the theory of a constructive trusteeship," or on the "idea" that the wrongdoer was an "involuntary trustee."

Courts have undoubtedly used such language in illustration of the theory of responsibility, on which they have held defendants liable in actions of assumpsit at law, and in bills of injunction in equity, for the use of patent property; but language used on the bench for mere purposes of illustration, cannot either fairly or safely be treated as authoritative decisions, and made the basis for assuming a jurisdiction not otherwise existing, and new to equity jurisprudence. The bill will therefore be dismissed.

*A. L. Walker, for complainant.*

*A. C. Callum and George Payson, for defendant.*

NOTE.—The foregoing decision was first published in the Chicago Legal News of May 17, 1879, in which issue was also published the following note of Mr. Albert H. Walker, counsel for the defendant in the case reported :

CHICAGO, May 15, 1879.

EDITOR OF CHICAGO LEGAL NEWS.

DEAR MADAM: The opinion of Judge Hughes, the United States District Judge for the Eastern District of Virginia, in the case of *Thomas Sayles v. The Richmond, Fredericksburg and Potomac Railroad Company*, furnished you for

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Note.

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publication by George Payson, Esq., ought, perhaps, when printed, be accompanied with a note to the effect that the question of jurisdiction therein decided has *generally* been decided the other way. An elaborate opinion of that kind by Judge Brown, was printed in your paper in 1877 (9 Chicago Legal News, 255), and the same contrary decision was made in the following unreported cases :

*Vaughan v. The South and North Alabama Railroad Company*, decided by Justice Bradley, in the Northern District of Alabama, in June, 1877.

*Sayles v. The Dubuque and Sioux City Railroad Company*, decided by Judges Dillon and Zane, sitting together, in the District of Iowa, in February, 1878.

*Vaughan v. Wallace*, decided by Judge Woods, in the Northern District of Georgia, in October, 1877.

*Sayles v. The South Carolina Railroad Company*, decided by Judge Bond, in the Eastern District of South Carolina, May, 1878.

*Sayles v. The Chicago, Burlington and Quincy Railroad Company*, decided by Justice Harlan, in October, 1878. In giving his opinion orally, Justice Harlan said: "I am convinced that it is settled law, determined by the weight of authority, that independent of those cases where the account may be had on the ground of the injunction, the jurisdiction is now entertained in the chancery court, on the ground that the party violating the patent is a *trustee*, and holds whatever profits he has made in trust for the patentee."

Prior to Judge Hughes's decision, the question had never but once been decided as he decided it, to wit: in the case of *Vaughan v. The Central Pacific Railroad Company*, reported in Sawyer's Reports of the Ninth Circuit.

I am, very respectfully, yours,

ALBERT H. WALKER.

Mr. Walker's associate counsel afterwards received a letter from Mr. Walker, dated June 19, 1879, as follows :

I argued the jurisdiction of equity over a suit under an expired patent before Justice Miller, in Leavenworth, Kansas, on the 5th of June. Judge Hughes's decision was much relied upon by Mr. Payson and ex-Secretary of the Interior Usher, for the defendant, but Justice Miller held with me and took jurisdiction after taking the case under full advisement.

The preponderance of authority, as to the United States Circuit Courts, would therefore seem to be against the view held by Judge Hughes.

It is to be said that the cases mentioned in Mr. Walker's letter of the 15th of May were merely mentioned by counsel in their argument at Alexandria, but not produced ; and that the judge had no means of examining them and ascertaining their precise meaning. The decision of Mr. Justice Miller has been rendered since.

A question of such importance ought to be settled by the Supreme Court, and the case above reported will go to that forum for review.

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Statement of the case.

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*United States Circuit Court, Eastern District of Virginia, at Richmond, May, 1879.*

D. H. GORDON v. JAMES H. DOOLEY, TRUSTEE IN BANKRUPTCY OF ASA SNYDER.

Where a rent-charge of \$1000 per annum is purchased for \$12,500 in a State where six per cent. is the lawful rate of interest, and there is no intention or contract, direct or indirect, that it shall be considered a loan, and no provision in the deeds of assurance by which in the event of default the original purchase-money can be returned, nor any law in existence on the statute-book under which after default the purchase-money can be recovered back :

*Held*, That the contract is not usurious, but valid, binding, and to be enforced in equity.

IN equity.

*John A. Meredith and James Pleasants for complainant.*

*W. W. Gordon for the defendant, and Isaac H. Carrington for Thomas Wilson, who intervenes by petition.*

The bill sets out in substance the facts hereinafter detailed relating to a ground-rent sold by Snyder to Gordon. It avers that Asa Snyder became bankrupt on the petition of his creditors in 1877 ; that Dooley was appointed his trustee in bankruptcy ; that the ground-rent hereinafter mentioned was duly paid from July, 1866, to July, 1876, but that no part of the same has been paid since the latter date ; that the trustee is receiving an annual rental from the property hereafter mentioned of \$2700 ; that one Thomas Wilson is the beneficiary of a deed of trust from Snyder upon the same property, executed in October, 1876, and has filed his petition in this court, claiming to be paid out of said rents the arrearages of interest due to him upon a loan of \$10,000 secured by said deed of trust. The bill maintains that the claims of all creditors of Snyder, and especially Wilson, are subordinate to the claim of the complainant. It therefore prays that a

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receiver may be appointed to take possession of the property and rent out the same ; that the present trustee be directed to render an account of the rents he has received ; and, amongst many other things, that the complainant may be paid the rent due him in arrear, and the rents to accrue as they fall due, in priority over all creditors and Wilson.

The defendant, Dooley, and the petitioner, Wilson, resist the prayer of Gordon on the ground that his transaction with Snyder was usurious and void.

Two deeds were received for record in the office of the Hustings Court of Richmond on the 7th day of September, 1866. One of them had been acknowledged on the 27th day of August, in that year, but bore date on the 1st day of July, by which Asa Snyder and wife, of Richmond, Virginia, conveyed to Douglass H. Gordon, of Baltimore, Maryland, in fee for \$12,500, certain real estate on the corner of Cary and Tenth streets, in Richmond, described in the deed. The other deed had been acknowledged on the 29th and 31st of August and 4th of September, 1866 ; bore date the 2d day of July, 1866 ; and was a conveyance by the said Douglass H. Gordon and wife of the same property to the said Snyder, to have and to hold to Snyder, his heirs and assigns, etc., but subject to a perpetual annual ground-rent or rent-charge at the rate of one thousand dollars per annum, payable semi-annually, to be paid forever, with a covenant for entry for the purpose of distress if there should be default in making any payment of rent for six months ; with further covenant nine months after default in paying any semi-annual rent, for re-entry to take issue and profits for the satisfaction of rents in default ; and with final covenant that if the rent shall be in arrear for five years then that the grantor, Gordon, shall have power of re-entry and to hold in absolute fee. The deed contains no other covenant. By the laws of Virginia then in force (see Code of 1860, ch. 138, sec. 16 and 20) it was provided that on a person bringing ejectment upon such a covenant as the last one mentioned in this deed, if the party in default shall tender to the party entitled to rent, or pay into court, all the rent and arrears at any time due, with interest and costs, all further proceedings in ejectment shall cease ; or in case of a bill being filed

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in equity for relief against forfeiture of the land by the claimant, and of his being relieved in equity, he shall hold the land as he did before the proceedings began, without a new lease or conveyance.

The property which was the subject of these deeds was a foundry, supposed at the time to be worth \$50,000. Six or eight months before this transaction with Snyder, R. A. Lancaster, head of the firm of Lancaster & Co., bankers and brokers, of Richmond, had negotiated for Gordon a purchase of a ground-rent of \$1000 a year on the Belle Isle property of Richmond for \$12,500. Some six months before this transaction with Snyder, Gordon had requested Lancaster to negotiate the purchase for him of two other ground-rents of \$1000 each, at the price paid for the Belle Isle purchase, and on the 6th of July, 1866, in a postscript to a letter of that date, Gordon had repeated that request to Lancaster.

Snyder says in his testimony that late in the summer or early in the fall of that year (it was in fact in July) he called on Lancaster's firm for the purpose of negotiating a loan. It seems they first proposed to sell him stocks or bonds on which he might raise money. Sundry propositions of the sort he declined. Afterwards they sent for him and told him they had \$25,000 to invest in ground-rents. After taking some days for reflection he concluded to sell a ground-rent, and take \$12,500 of the money the firm had for that form of investment. In due time deeds were drawn. The first deeds proposed to him were not satisfactory. Finally, the deeds which have been described were prepared, and were duly executed and recorded by the proper parties. There were no direct negotiations between Snyder and Gordon. All that transpired between Lancaster and Snyder in the negotiation was oral. All that transpired between Lancaster and Gordon on this subject was by letter—Gordon being in Baltimore. There is nothing in the correspondence of Lancaster with Gordon, showing that in this transaction Gordon had any other object or aim than to purchase a ground-rent; nothing to show that he himself sought to place a loan, or considered the transaction with Snyder as directly or indirectly a loan of money. Lancaster testifies that he never at any time submitted to Gordon a proposition from

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Snyder to borrow money. He had been informed by Gordon that he wanted the ground-rents for some special legacies. Lancaster testifies positively that the purchase of the ground-rent from Snyder was not intended by any one to be a shift, or device, or contrivance to cover a loan of money, at a greater rate of interest than six per cent. per annum ; that he had no authority to enter into such a transaction ; that Gordon never had in the hands of his firm any sum whatever for investment at their discretion ; that when proceeds of sales made by them for Gordon came into their hands and were left there, they had no authority whatever to invest them without Gordon's previous direction ; that he never informed Snyder that his firm had any amount of Gordon's money for investment, and never offered to Snyder any sum of money or loan in behalf of Gordon. Lancaster repeats positively that the object of the deeds which were executed between Gordon and Snyder was to carry out in good faith the purchase of the ground-rent.

Several letters from Gordon to Lancaster, written in the summer of 1866, were put in evidence voluntarily by Gordon, very few of which refer to the transaction with Snyder. They contain nothing to show that Gordon intended that transaction as a device to cover a loan, or himself regarded or treated the transaction as a loan. The letters are full of statements and inquiries, showing that Gordon was in the habit of buying negotiable paper, put by others into the hands of Lancaster for sale, at rates of discount greater than six per cent. ; but they disclose no transaction usurious in the meaning of the law. These letters do not show that it was "the known practice" of Gordon to lend money on usury, under cover of devices in the form of sale, within the meaning of the ruling of the court in *McChesney v. Douglass*, 2 Randolph, 109. They prove no more than that he bought negotiable paper at rates of discount greater than six per cent. ; and show that in one case he refused to buy such a note made directly to himself as payee, or made payable to the maker's own order, without an intermediate indorser.

Snyder testifies that he always regarded the transaction as a loan upon the property, similar to a mortgage ; and he avers that Lancaster, from the character of his conferences with him,

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have understood thereby that I regarded it in the light of an ; of course I can't tell what *he* felt."

Lancaster testifies that he acted in the transaction as the agent of Snyder ; that he did not act as the agent of Gordon ; that he received a commission of \$125 from Snyder ; that Gordon paid him \$12,500 in Baltimore on a draft of Lancaster & Co., at the proceeds were placed to Snyder's credit in the bank-account of Lancaster & Co., in Richmond, and was drawn on by Snyder. Lancaster testifies that he took commissions only in all cases only from the seller, and never took them from the purchaser.

The following opinion of the court was delivered by

THE COURT, J.—I think the foregoing statement embraces all the facts in the case that can at all affect the decision of the question at issue, which is whether the two deeds, by which a mortgage was nominally secured by Gordon upon the foundry property of Snyder, were really designed to cover, and did cover, a loan of \$12,500 from Gordon to Snyder at the usurious interest of \$1000, or eight per cent. per annum.

The intention of the parties to the transaction was in fact to make up a usurious loan, or if the deeds are such as, carried by their legal effect, actually provide for a loan, then the transaction is usurious and void under the law of Virginia as it stood at the date of the

deeds have nothing to do here with the technical term usury ; we are to do only with the terms of a specific law. Section 5, Chapter 1, of the Code of 1860, in force in 1866, provided that "all mortgages made directly or *indirectly* for the loan of money at a rate greater than six per cent." shall be void. This is the law which rules the transaction between Gordon and Snyder.

The deeds which then were executed are *assurances*. They do not provide *directly* for a loan of money. They in terms provide for the sale by Snyder to Gordon of a rent-charge of \$1000 per annum, to be paid to Gordon in consideration of the sum of \$12,500 paid down by Gordon to Snyder.

It is true that in this transaction was in good faith the sale of a rent-charge,

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it is not usurious, though in effect the deeds provide for an annuity of \$1000 to be collected on the original payment of \$12,500 by Gordon to Snyder.

If the parties intended to make a usurious loan in the form of a sale, then, of course, the transaction will be illegal and void; but if it appear that a sale was really intended, then it is equally clear that the transaction is legal and valid. The difference between the two cases is, that the law allows the one and condemns the other; and though you cannot do what the law condemns, yet you *may* do what the law allows, even though the effect be precisely the same. *Brockenhough v. Spindle*, 17 Grattan, 36.

A man may purchase bonds or negotiable paper in the market at any discount, whether they were manufactured for sale or not, and not be guilty of usury: *Hansborough v. Baylor*, 2 Mun. 36; *Taylor v. Bruce*, Gilmer, 42; *Whitworth v. Adams*, 5 Rand. 333; and the same is held in many other cases. Nay, more, he may sell property greatly above its market value, knowing that the purchaser intends selling it again at its market value for the purpose of raising money, and the sale will not be usurious if it is a sale. *Selby v. Morgan*, 3 Leigh, 577; and *Brockenhough v. Spindle*, 17 Grattan, 21. But if such sale is accompanied by a loan of money as part of the transaction, the whole is usurious. *Stribling v. Valley Bank*, 7 Leigh, 26.

If the deeds between Gordon and Snyder, though not in form and legal effect providing for a loan, were accompanied by a contract or understanding in any form, oral or written, agreed to by both parties, that the amount of \$12,500 paid for the rent-charge was to be treated as a loan at an annual interest of \$1000, such side-contract would vitiate the main transaction, though it should not appear on the face of the deeds; or, though no such outside contract or understanding should be proved, yet, if the deeds themselves contain any clause or provision, or if they make an omission by virtue of which, under the laws of the country, a return of the principal money originally paid could be secured, then a loan would be thereby indirectly and substantially provided for, and the contract would be usurious.

It is clear from the evidence, that whatever idea Snyder may have had to the effect that he was negotiating a loan from Gordon, yet neither Gordon nor Lancaster entertained it. It is clear that the minds of Snyder and Gordon did not meet in mutual agreement on a contract for a loan in fact, through the sale of a rent-charge in form. These two men did not see each other.

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was no direct communication between them. The whole was transacted through Lancaster. Nor did Lancaster and Gordon meet personally in the course of the negotiation. It was carried on wholly by letters between them, and these letters show that a loan was either actually or impliedly the result of their correspondence. In short, the evidence shows to the satisfaction of the court that there was no mutual understanding between Lancaster and Gordon to the effect that their transaction was to be the sale of a ground-rent, but in fact a loan.

As the contract or understanding not having been mutually agreed upon by the parties, by a common intention not expressed in the deeds, the only question left is, whether the deeds themselves, by their tenor, provisions, and covenants, directly or indirectly, expressly or impliedly, by their actual provisions or by the omission of provisions, provide for or admit of a return or reimbursement of the \$12,500 paid by Gordon for the rent-charge, by any means or method or possibility known to the law. The counsel of Wilson, and of Dooley, the trustee in bankruptcy, contend that these deeds show a usurious transaction, and that this case is entirely similar to that of *Scott v. Lloyd*, reported in 4 Peters, 205, and again reported in 9 Peters, 53. Except in one particular this case is identical in the nature of the transaction with that of *Scott v. Lloyd*, where a rent-charge of \$5000 per annum, purchased for \$5000 paid down, was held usurious. In that case, as it is reported in 9 Peters, Chief Justice Marshall reviewed every case, American and English, which had been reported, in which contracts not usurious in form, but which were to have been usurious in fact, had been passed upon by the courts. The whole learning of this important and interesting question is there given in the lucid and conclusive manner usual in the opinion of a great judge. I refer for a citation and review of all cases in that exhaustive opinion, which leaves me nothing to do but to enquire what it decides, and compare that case of *Scott v. Lloyd* with the one at bar.

Chief Justice summed up the law as to annuities and ground-rents in the following language:

The ingenuity of lenders of money has devised many contrivances to evade the law, and, under forms sanctioned by law, the statute of usury may

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be evaded. Among the earliest and most common of them is the purchase of annuities secured upon real estate. The statute does not reach them, not only because the principal may be put at hazard, but because it was not the intention of the Legislature to interfere with individuals in their ordinary transactions of buying and selling, or other arrangements made with a view to convenience or profit. The purchase of an annuity or rent-charge, if a *bona fide* sale, has never been considered as usurious, though more than six per cent. profit be secured. Yet it is apparent, that if giving this form to the contract will afford a cover which conceals it from judicial investigation, the statute would become a dead letter. Courts, therefore, perceived the necessity of disregarding form, and examining into the real nature of the transaction. If that be in fact a loan, no shift or device will protect it.

After thus explaining the law affecting the case, the Chief Justice proceeded to examine into the "real nature" of the transaction before him. As I have before said, the facts of the transaction in that case were identical in their character with those in this case. But there was one provision of the deed there which is not to be found in the deeds in this case. In addition to clauses similar to corresponding clauses in the deeds here, the deed there contained the following clause, Scholfield being in the relation of Snyder and Moore of Gordon to that transaction: Moore covenanted that if Scholfield, his heirs or assigns, "should at any time after the expiration of five years from the date of the deed, pay to said Moore, his heirs and assigns, the sum of five thousand dollars, together with all arrears of rent, he, the said Moore, his heirs and assigns, would execute and deliver any deeds or instruments which may be necessary for releasing and extinguishing the rent hereby created, which, on such payments being made, should forever cease to be payable." 4 Peters, 208.

It is useless to show that this clause did provide for a return of the \$5000 advanced in the beginning by Moore. The clause *ex vi termini* converted the sale and purchase of a rent-charge into a loan. In terms the transaction was to stand as the sale and purchase of a rent-charge for five years, and after that was to assume the character of a mortgage to secure a loan of \$5000 at an annual rent of \$500. It is useless to say that on the principles heretofore stated in the foregoing pages, this provision of the deed brought the transaction between Scholfield and Moore

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y of usurious loans, and made what was in form rent-charge in fact a loan secured by mortgage. sary to state how the Supreme Court decided the matter of course, it held the transaction to be usurious accordingly. It was not the fact that the served on ground purchased for \$5000 was equivalent of ten per cent. per annum that was held to action, but the fatal circumstance was the addition a provision was made for a return of the purchase-period, during which it was to carry ten per cent. rent.

of *Tyson v. Rickard*, 3 Harris & Johnson, 109, a rent-charge reserved at the rate of fifteen per sum paid for the purchase of it, where the contained a provision allowing the vendor within five years property on returning the sum borrowed with all rent due, a case all fours with *Scott v. Lloyd*.

Does all fours with the one at bar? Plainly there is no such fatal clause in the deed of Gordon to give the rent as that which I have quoted from the other cases. There is no provision whatever setting to, or permitting the return of the \$12,500 paid the rent-charge. Now I admit that, though no actually appears in the deeds which passed between Gordon, yet if there was an outside understanding, oral or written, equivalent to it, by which it was agreed that the transaction should in fact be a mortgage case would be the same as if such a stipulation were in the deed. But no such outside agreement is shown, nor was such made at all. I will go farther and under the terms of the deeds between Snyder and Gordon, and the clause relating to a forfeiture of the fee, in case of default, Gordon could, under the laws of Virginia, recover the money paid for the purchase of the land. His legal power of recovery would have to be connected with the deeds, and be treated as a part of

of equity in relieving against the forfeiture of the

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fee would not provide for a return of the purchase-money paid for the ground-rent. It would treat the 20th section of the 138th chapter of the Code of 1860 as part of the contract, and give relief against the forfeiture in accordance with its provisions. It could not, on any known principle of law or equity, return to Gordon his purchase-money of \$12,500.

This being so, and the deeds between Snyder and Gordon making no provision for the return of the \$12,500 to Gordon, and the law giving him no power to recover it back, it follows that Gordon, by the transaction, parted with that purchase-money forever, and absolutely, and that the transaction was not directly or indirectly, actually or intentionally, by express provision or through any means known to the law, a loan within the terms of the 5th section of chapter 141 of the Code of 1860, making the taking of more than six per cent. on loans usurious, and is not void, but is valid and must be enforced in this case as against Wilson and other creditors of Snyder.

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*United States Circuit Court, Eastern District of Virginia, at  
Richmond, April 10th, 1879.*

## O. A. ERICSSON v. CITY OF MANCHESTER.

A municipal corporation is liable in damages for the defective condition of its streets to an individual suffering injury from that condition, under certain circumstances.

This liability is not affected by the fact that the street, from defects in which the injury happens, is in the proprietorship of a private corporation.

ON motion for a new trial.

*C. P. Meredith and S. Macon, for the plaintiff.*

*J. S. McRae and T. M. Logan, for the defendant.*

THE cities of Manchester and Richmond are the corporators of the James River Bridge Company in about equal interests. The

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consists of a bridge over the James River, and of an earthen causeway, extending from the southern edge of the Manchester side across the flats and over the Dan-ailroad (which it crosses upon a stone arch) to the level of 10th Street in Manchester, of which it and the bridge are a part. The accident by which the plaintiff was disabled was a fall which he had at night from a low parapet of the arch over the railroad, down, some fifteen feet, to the ground on the side of the railroad. The bridge lies within the corporate limits of Richmond. The causeway, which is a part of the same, is about a hundred yards or more long, lies within the corporate limits of Manchester.

The work was a joint public undertaking of the two cities, and was authorized by an act of Assembly passed November 5th, 1870, incorporating the James River Bridge Company.

The commissioners incorporated by this act are mentioned as having been appointed by the trustees of Manchester. The city of Richmond, the county of Chesterfield, and certain townships of the county of Chesterfield, were authorized to appoint like commissioners, and in that manner to become corporators of the company; and it was expressly provided that the authorities of Richmond, Chesterfield, and these townships should have concurrent authority over their respective commissioners similar to that which the city of Manchester has over its commissioners by the act.

A public highway was provided to be built by two municipalities, one county, and certain of its townships. In fact, however, it was built by Manchester and Richmond alone. The cities of Manchester and Richmond are connected by two carriage bridges open to the public, of which this bridge of the James River Bridge Company is one. It is a free bridge, open to the public without charge of tolls; the other is a toll

The city of Manchester is a chartered corporation, endowed by the state with liberal powers of taxation. It has full power to extend, widen or narrow, lay out, improve, and light its streets, and keep them in order. It has ample powers of police. It has all the rights, immunities, powers, and privileges usually enjoyed by a city, and is charged by statute with the duties and obliga-

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tions ordinarily imposed on, municipal corporations. It may not only tax the property of its citizens, but may contract loans. Its taxes are a lien upon the real estate of the citizens taxed. It may condemn lands for streets, subject to the payment of just compensation. The remaining facts of the case appear in the opinion of

HUGHES, J.—This is an action on the case for damages, the declaration charging with the usual amplitude of allegation, among other things, that the street on which the accident occurred was a public highway of the city, that it was at the time, and had been for some time before, in unsafe condition for the want of a proper railing or wall to protect persons passing over the arch from accident, and that the defendant had notice of its bad and defective condition, and wilfully neglected to make it safe. (The case was tried at the February Term of the court, when a verdict was rendered for the plaintiff in which his damages were assessed at \$5500.)

At the trial the defendant insisted generally that a city is not liable to individuals injured for the bad condition of its streets. It insisted, moreover, that this causeway was not a public street of the city, and for that reason that the city was not liable for the accident. It insisted further that the causeway was the property of the James River Bridge Company; that it was under the bridge company's control, and not under the control of the city, and that for that reason the city was not liable.

Elaborate argument, based upon very numerous authorities, was made at the trial by counsel on either side, on prayers for instructions to the jury. The court was obliged to rule upon them off-hand, and in doing so invited in advance a motion for a new trial, in order to a more deliberate argument of the law of the case, in the event of a verdict for the plaintiff, giving to the jury the following instructions:

## INSTRUCTIONS TO THE JURY.

There are three questions for the jury, viz.:

1. Whether a proper guard or protection had been provided at the point where the accident to the plaintiff occurred. If there was not,

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2. Whether the accident was in consequence of the absence of such proper guard or protection ; and

3. If so, whether damage ensued to the plaintiff, and what amount of money shall be allowed as the measure of the damage to him.

If the jury believe from the evidence that a proper guard or protection to the highway was not provided, that the accident occurred in consequence, and that damage ensued to the plaintiff from the accident,

Then the court instructs the jury that the city of Manchester is liable for the damages, unless it proves that the plaintiff sustained his injury through his own neglect or want of care.

The jury are also instructed that in considering damages in this case they may take into account any permanent future suffering and disability resulting to the plaintiff from the accident.

A motion for a new trial was duly made by the defendant and the questions of law very fully reargued. The motion was, of course, based upon the ground that the court misruled at the trial on the law of the case.

I am now to revise the ruling of the court at the trial of this case, made in the instructions given to the jury. There are three questions in the case, viz. :

1. Whether the causeway was a highway or public street of Manchester. If so,

2. Whether Manchester as a municipal corporation is liable to an individual for damages resulting to him from the defective or bad condition of its streets ; and, if so,

3. Whether the relations of the James River Bridge Company to this particular causeway relieved Manchester from responsibility for its defective or bad condition.

1. As to the first point, I think the causeway was in every sense a public highway ; and, lying wholly within the corporate limits of Manchester as it did, I think it was a public street of the city, subject to its control and authority in every way in which any other street of the city is so subject. For the purpose of building the bridge and causeway, which was a joint enterprise of the two contiguous cities, it was found convenient to make use of the instrumentality of a joint stock company ; but the adoption of this method of action was not intended to, and did not, convert what was in its nature a public highway, connecting two cities, into the private property of a private company.

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If the two cities had designed by such an expedient to avoid the liability of keeping a public highway in safe condition, I cannot suppose that an act of incorporation for the joint stock company would ever have been given them by the Legislature. This causeway is the only free highway connecting the two cities. It is essentially and necessarily a public highway, and being in the corporate limits of Manchester, is in its essential character a public street of that city.

Stress was laid by counsel for defendant upon that section of the charter of the city of Manchester which provides that any street which shall have been open and used by the public as a street for five years shall become a public street and be subject to the control of the council. This section has no other effect than to render the mere fact of a street being open to the use of the public for five years, *ipso facto*, a subjection of it to the control and power of the city. The object of the provision was to get rid of the refined learning of the law-books on the question what constitutes the dedication of a street to the public in cases where doubt exists. The numerous decisions on that subject cited at bar have no application to cases where there is no doubt about a street being used, and intended to be used, by the public, as in the case before us.

Here was a street necessarily public in its very nature. No formal adoption of the bridge by Richmond, or of the causeway by Manchester, was necessary to constitute them a public highway. They were constructed by public bodies, with public funds, for public use, as a public highway, and were thrown open to the public for free use at the start. A formal adoption of them as a public street would, therefore, have been an idle ceremony. The use of them for five years by the public was not necessary to clear up any doubt as to their public character, and thereby to establish upon them the control and authority of the respective municipalities. I could not so falsify an evident and indisputable fact as to refuse to hold that the causeway in question is a public street of Manchester, as such subject to its control, and as to which Manchester is liable to such duties and responsibilities as the law imposes upon municipal corporations.

2. The next question is, whether Manchester as a municipal

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corporation is liable for the defective or bad condition of its streets, to individuals sustaining actual injury therefrom.

Only a few weeks ago the Supreme Court of Appeals of Virginia, in the case of *Noble and Wife v. The City of Richmond*, 3 Virginia Law Journal, 95, passed upon this question, and decided that:

A municipal corporation which, by its charter, has the power to lay out, improve, light, and keep its streets in order, is liable in damages at the suit of an individual who sustained injuries by reason of the neglect of said corporation to keep its streets in a proper and safe condition; and that such person may recover damages for such injuries in an action in which he alleges and proves that the corporation had notice of defects or want of repairs in its streets (which notice may be implied), and that he was injured in consequence of such defects in a street.

The decision was rendered in a case in which the plaintiff's wife had fallen into a hole in the sidewalk of a street of Richmond at night, the hole having been left uncovered and no light placed near by.

This was the first case in which that court had had occasion to deal directly and particularly with this important question of law, and it made this decision after a full review of all the authorities bearing on the subject, citing, among others, *City of Richmond v. Long's Administrator*, 17 Grant, 375; *Sawyer v. Corse*, 17 Grattan, 230; the English cases of *Henley v. Mayor, etc., of Lyme Regis*, 5 Bing. 91, and *Russell v. Men of Devon*, 2 Term, 667; *West v. Trustees of Brocksport*, 16 New York, 163; Judge Cooley's opinion in *Detroit v. Blakeley*, 21 Michigan, 84; *Weightman v. Corporation of Washington*, 1 Black, 39; and *Barnes v. District of Columbia*, 1 Otto, 540.

The case of a municipal corporation existing by authority of a charter obtained by its solicitation, clothed by charter with powers of taxation and administration, and charged with correlative duties and responsibilities, was distinguished by the court from that of a *quasi* corporation, like a county or township, exercising no statutory authority, and having no power except the limited, ordinary powers incident to counties and towns under the common law.

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The Supreme Court of the United States had previously announced this principle in the case of *Weightman v. Washington City*, 1 Black, 39, upon a wider review and a much fuller citation of authorities, citing the leading English cases; also *Erie v. Schwingle*, 22 Pennsylvania, 384; *Storrs v. City of Utica*, 17 New York, 104; *Conrad v. Trustees of Ithaca*, 16 New York, 159; *Browning v. City of Springfield*, 17 Illinois, 143; *Hutson v. City of New York*, 5 Sandford S. C. Rep. 289; *Lloyd v. Mayor and City of New York*, 1 Selden, 369; *Wilson v. City of New York*, 1 Den. 595 and 2 Id. 450; *Rochester White Lead Company v. City of Rochester*, 3 New York, 463 and 763; *Smoot v. Mayor, etc., of Wetumpka*, 24 Alabama, 112; *Hicocke v. Plattsburg*, 15 Barb. 427; *Mayor, etc., of New York v. Furge*, 3 Hill, 612, and other cases.

This decision was rendered in a case where the plaintiff had been injured by the falling in of a defectively constructed bridge constructed by agents of the city.

The court held, that where the charter of a municipal corporation gives it the control and management of a bridge, makes it chargeable with the expense of keeping it in repair, and gives it power to provide the means of doing so, then such corporation is liable to the public for the safe condition of the bridge, and to individuals for injuries resulting from its neglect to keep it in repair; and this even though only one end of the bridge is within its limits.

Thus the courts of last resort both of Virginia and of the United States, to say nothing of other courts, have settled the principle of the liability of a municipal corporation in damages for injuries received by an individual, resulting from defects in or the bad condition of its streets, and therefore it is useless for me to refer to the multitude of decisions in England and America in which this subject has been discussed. I cannot say that the precedents in England have been consistent. They settle, beyond question, the principle, that a parish, which is but a mere ecclesiastical precinct, is responsible for damages resulting from the bad condition of its roads; and they settle the opposite principle with equal decisiveness, that such *quasi* corporations as *hundreds* and *counties* are not so responsible. These diverse rul-

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ings result no doubt from antiquarian reasons that have no application in this country. But the English precedents also establish the principle that municipal corporations, having by charter the extraordinary powers of taxation and control over streets usually given to chartered cities, are responsible to individuals injured for defects in their streets; and this latter proposition may be considered to be settled law, both in England and America. True, there is the case of *Detroit v. Blakeley*, 21 Michigan, 84, in which the contrary of this latter doctrine is held; but this case is anomalous, and is overborne by the great mass of contrary authorities on this continent.

At all events this court is bound by the ruling of the Supreme Court of the United States in *Weightman v. City of Washington*, already cited, and of the Virginia Court of Appeals in *Noble and Wife v. City of Richmond*, 3 Virginia Law Journal, 95. These decisions leave me no alternative but to hold that the city of Manchester is liable to individuals for damages resulting from injuries caused by the defective condition of its streets.

3. The only question remaining for consideration, therefore, is, whether the fact of the particular causeway in question having been constructed by and being the property of the James River Bridge Company, relieves Manchester from the liability imposed upon her by law for the safe condition of her streets.

This is the difficult question of the case; difficult because I know of no precedent which has presented the precise facts which constitute the distinguishing features of this case.

The point was much relied upon by counsel for the defence, that the mere fact of the James River Bridge Company being liable to the plaintiff (as it certainly is) established the non-liability of the city of Manchester. But it is a *non-sequitur* to insist that such a liability does exonerate the city. If, for illustration, we suppose the case of a turnpike company's road running along and constituting a street of a city, I would see no difficulty in holding the company responsible for its defects as a road, while holding the city at the same time responsible for its defects as a street. There are many cases of dual liability known to the law.

In such a case as that of the turnpike supposed, I should think

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it clear that there was a dual liability, and that an individual receiving injury from defects in the road or street might elect whether to proceed for damages against the city or against the private company.

I conceive that the existence of a right in an injured person to proceed against the company could not of itself negative his right otherwise belonging to him to proceed against the city. Nor could the responsibility of the city to an individual sustaining injury from the defective street in any way affect the responsibility of the company to the city for negligence in respect to its road.

The principle of a city's liability for defective streets, notwithstanding the fact that they were under the control and authority of an intervening agency, itself independent of the city, has been established by very authoritative decisions. One of these is the case of *Bailey v. Mayor, etc., of New York*, 3 Hill, 531, and S. C. 2 Denio, 433. The Croton Aqueduct and Water-works were constructed for the city of New York under the control and direction of five commissioners appointed by the governor of the State, who were not responsible to the city. One part of their work, a dam forty miles from the city, had been defectively constructed, and had given way, causing great damage to the property of the plaintiff. He sued the city, and under the ruling of the court recovered a verdict and judgment for a large amount. The case was carried to the Supreme Court of the State, and that court, Judge Nelson (afterwards justice of the Supreme Court of the United States) delivering the opinion, affirmed the ruling of the court below. It was then carried to the Court of Errors and Appeals (the Senate) of the State, where the decision was affirmed, Chancellor Walworth, among others, delivering an affirming opinion.

This was a very strong case for the city. The fault was committed by a board which it did not appoint and could in no manner control. The defective work was forty miles beyond its border and its control. Yet on the principle that she and her citizens were to be the chief beneficiaries of the work she was held liable.

This New York decision is the more important to us, because it has been made the basis of a decision upon the same point by the

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Supreme Court of the United States in the case of *Barnes v. The District of Columbia*, 1 Otto, 540. That was an action brought by an individual against the District of Columbia, to recover damages for an injury resulting from a fall into a pit made by workmen in grading a street. The liability of the District was denied on the ground that a body of five men, called the Board of Public Works, appointed by the President of the United States, were invested by act of Congress with the entire control of the streets and alleys of the District, and their regulation and repair; that this board (and not the District) was responsible to the public and to individuals for the condition of the streets; that over this board the District had no control; and that the District was consequently relieved from the duties and responsibilities in respect to its streets, which might otherwise have attached to it as a chartered municipal corporation. But the court discarded this reasoning and held the District liable. In its opinion, after citing very many cases, in speaking of the case of *Bailey v. The Mayor, etc., of New York*, the court said:

The learned judge (Nelson) repudiates the argument arising from the fact that the commissioners were appointed by the State; that the defendants had no control over their actions; that they were bound to employ them, and to submit to the independent exercise of their control. He held that the commissioners were the agents of the city, and that the latter was responsible for their negligent conduct. . . . This case is nearer the one we are considering than any other reported in the books. The struggle in the New York courts was between the dictates of that evident justice and good sense which required that the city should indemnify a sufferer for the loss arising from the acts of those doing a work under its authority and for its benefit, and the technical rule which exempted it from liability for acts of officers not under its control or appointed by it.

The only difference between the two cases which have been described and the one at bar is, that in them the board or the commission represented a single city, whereas here the bridge company represents two corporations, that is to say, Richmond and Manchester jointly. This, however, does not affect the principle established by the two cases, that the liability of a municipal corporation for the condition of its streets is not relieved or removed by the interposition of a subordinate corporation an-

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cillary to the principal one, and charged with the direct possession and control of its streets, or of a particular street.

I think the case of *Bailey v. The Mayor of New York*, and of *Barnes v. District of Columbia*, furnish the law to the case at bar, and establish the liability of Manchester in this suit for the defective condition of the Seventh Street causeway, where the fearful accident which is the subject of this suit befell the plaintiff.

As I cannot change the ruling which I made in the instructions given to the jury at the trial, I must overrule this motion for a new trial.

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*United States Circuit Court, Eastern District of Virginia, at Richmond, February 11th, 1879.*

UNITED STATES v. JOSEPH M. HUMPHREYS ET AL.

In order to their being liens upon real estate in Virginia, judgments obtained in courts of the United States, in the State, need not be recorded.

In equity.

*L. L. Lewis, United States Attorney, and Henry T. Wickham, for the United States.*

*F. W. Christian, for the defendants.*

The facts of the case appear in the opinion of the court.

HUGHES, J.—The very able and informing briefs of counsel leave me nothing to do but state the points of the case, and deduce a decision from the authorities which govern it.

The United States obtained a judgment in October, 1877, against Joseph M. Humphreys, late collector of customs at Richmond, and his sureties on his official bond. In January, 1878, Humphreys executed a deed of trust to secure money borrowed, through Thomas N. Page, on lands of his lying in the county of Henrico, near the city of Richmond.

The United States brings its bill in equity in this court

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against J. M. Humphreys and other proper parties defendant to subject this land to the lien of its judgment. And the single question in the case before the court is, whether the judgment is of higher dignity than the trust-deed, and can be enforced as against the lien of the debt secured by that deed.

The contention of the trust creditor is that the United States lost its lien and the benefit of its priority in time over the deed by failing to docket its judgment in pursuance of the requirement of the 8th section of chapter 182 of the Code of Virginia, which provides that "no judgment shall be a lien on real estate as against a purchaser thereof for valuable consideration without notice, unless it is docketed" in the county or corporation where the land lies, on the judgment docket required to be kept by the clerk of each county or corporation court of the State, either within sixty days next after the date of such judgment, or fifteen days before the conveyance of said estate to the purchaser.

I shall first consider the question as if the judgment creditor was a private creditor.

The 6th section of the same chapter of the Code of Virginia provides that "every judgment for money rendered in this State heretofore or hereafter against any person shall be a lien on all real estate of such person." This provision was first embodied in the Code of 1849. Previously to that time, and, indeed, subsequently until March 26th, 1872, the writ of *elegit* was in use in Virginia, but on that date that writ was finally abolished by special act of the Legislature.

Such being the law of Virginia as to the lien of judgments in the State courts, the next inquiry is, how does the law thus existing apply to judgments of courts of the United States rendered in the State of Virginia?

It is well-settled law that judgments rendered in the courts of the United States are liens upon the defendant's real estate in all cases where similar judgments of the State courts are made liens by the law of the State. *Wood et al. v. Chamberlain et al.*, 2 Black, 430; more particularly page 438, *et seq.* Many other decisions of the Supreme Court of the United States might be cited to the same effect. These judgments are liens, not by vir-

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tue of the adoption of State laws by the United States courts, by rules of court or otherwise, but by virtue of acts of Congress giving the same effect to final process of United States courts as is given by State laws to process of the courts of the States in which they are held; giving the same remedies on judgments and decrees of Federal courts as are given by State laws on judgments and decrees of State courts; and giving authority to the United States courts to make proper rules for securing these objects.

We are therefore to look to acts of Congress on this subject to ascertain how far judgments of United States courts in Virginia are liens upon lands. If there had been no such act of Assembly as that of March 26th, 1872, abolishing the writ of *elegit* in Virginia, it might probably be contended that in Virginia the process act of Congress of 1828 is not repealed by the act of Congress of June 1st, 1872, now section 916 of the Revised Statutes of the United States, and that the writ of *elegit* lies from the United States courts in this State; and that the lien of the writ of *elegit* is, unlike that given by section 6 of chapter 182 of the Code, not subject to the condition of docketing the judgment imposed by section 8 of that chapter. But the Virginia law of March, 1872, does abolish the *elegit*, and section 916 in the Revised Statutes, giving the same effect to, and remedies on, judgments of the United States courts as were *then* (1874) given by State law to judgments of State courts, repeals by substitution in Virginia the process act of 1828 as to the *elegit*, whatever it may do in other States, under the particular legislation of those States bearing upon this subject. Decisions of United States courts in other States, seemingly in conflict with this view, were rendered upon the condition of State legislation in those States, and do not necessarily apply to the condition of legislation in Virginia.

The judgment in this case against Humphreys became a lien upon his lands just as it would have become if it had been a judgment of a State court; and the remaining question is, whether by the execution of the deed of trust which Humphreys gave in January, 1878, the judgment "*ceased*" to be a lien under the operation of the 967th section of the Revised Statutes of the United States, which provides that judgments of United States courts within a State "shall cease to be liens on real es-

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tate, etc., in the same manner and at such periods as judgments of the courts of the States cease by law to be liens thereon."

I do not doubt that so far as this law shall operate *proprio vigore* in any case—for instance, as a statute of limitations—the lien of a judgment of a United States court would cease just as that of a State court would do under a State statute of limitation; but I am precluded by a current of decisions rendered by courts of the United States from holding that the lien of a judgment of a United States court ceases in the event it is not docketed in accordance with a State law as against a subsequent purchaser without notice. I am precluded from holding that the lien of the judgment in this case ceased in January, 1878, as against the trustee's title under the deed of trust executed in that month by Humphreys.

The decisions of the United States courts have been in nothing more uniform, unvarying, and consistent than in holding that where rights once attach under laws of Congress adopting laws of the respective States, these rights are not divested by a non-compliance with conditions, restrictions, or limitations contained in those very State laws, where a compliance with the latter would depend upon a resort in any way to State officials, or to the machinery of the State judiciary.

The provision of the Code of Virginia making a judgment for money a lien upon the real estate of the debtor makes, in the 8th section of chapter 182, an exception in favor of a subsequent purchaser without notice, where the judgment has not been docketed. The process of docketing depends upon the action of an officer of a State court in keeping a docket, and upon that officer's actually docketing the judgment of the United States court when presented.

There is no law of Virginia requiring this officer to docket the judgment of a United States court. He acts strictly in a ministerial capacity, and is not required by any express law to enter such a judgment when presented for such a purpose. Congress, on its part, has not (as I think it should do) by law required clerks of United States courts to keep such dockets in each district as the law of Virginia requires to be kept in each county. So as to other restrictions, exceptions, limitations, and conditions

which State laws conferring rights insert in the laws conferring them. I think it may be laid down as a rule having few exceptions that in any case of a law of a State conferring rights upon conditions, or with exceptions, and adopted by Congress as operative in that State, wherever the exceptions or conditions depend upon the action of State officers, so that the enjoyment of rights thus once conferred could be defeated or divested by the action, or refusal to act, of a State officer, such a condition, or exception, in the State law is uniformly held by the United States courts not to limit the rights conferred by the act of Congress adopting the State law. This was decided in *Palmer v. Allen*, 7 Cranch, 550—64; *Wagram v. Southard*, 10 Wheaton, 1; *United States Bank v. Halstead*, 10 Wheaton, 51; *Boyle v. Zacharie et al.*, 6 Peters, 648; and (more particularly in their bearing upon the question now under consideration) *Massengill v. Downs*, 7 Howard, 760; and *Curroll v. Watkins*, 2 Abbot's U. S. Reports, 474. In these last cases the law of Mississippi, giving the lien in favor of judgments for money, was modified by provisions requiring judgments to be docketed, and making exceptions in favor of subsequent purchasers without notice as against judgments not docketed—provisions identical in purport with those of Virginia. But the Supreme Court of the United States held in the former case that in States where judgments create liens a judgment of a United States court has that operation throughout the judicial district in which it is rendered, and any provisions of State legislation modifying the lien of judgments and restricting their operation cannot affect the lien of a judgment of a United States court.

I think the decision of the Supreme Court in *Massengill v. Downs* is decisive of the question under consideration, and requires me to decide that the judgment of this court rendered in October, 1877, is good against the trust-deed executed in January following, and that the lien created by section 916 of the Revised Statutes of the United States, adopting section 6 of chapter 182 of the Virginia Code, is not controlled or affected by section 8 of that chapter of the Virginia Code. This court has decided that a *lis pendens* in a United States court binds property in litigation, though not recorded and docketed, as required by State law if in a State court. *Rutherghlin v. Wolf*, 1 Hughes, 78.

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I do not think it necessary to go farther and inquire whether a judgment in favor of the United States has the same force as a judgment in favor of the State of Virginia in this State, and as a judgment in favor of the Crown in England. I am inclined to believe on authority, and would so decide if necessary in this case, that judgments in favor of the United States stand on the same principle as those in favor of the Commonwealth and of the Crown; that they are a lien independently of laws making judgments generally a lien upon the estates of debtors, and do not depend upon those laws. Although the ancient writ in favor of the Crown of *extendi facias* is obsolete by mere disuse, having given place to more efficient remedies, yet I imagine that it still lies theoretically; and its theoretical existence is sufficient to establish the liens in this country of judgments in favor of the State and Federal governments.

Their precedence over all liens in favor of private persons stands upon such broad maxims as *Salus populi suprema lex*; *Thesaurus regis est pacis vinculum, et bellorum nervi*, and the like. Certain prerogatives of the Crown belong in the United States, not only to the State governments, but to that in the United States. Those which belonged to the king in England as *parens patriæ*, as distinguished from those which belonged to his person, survive to the government of the United States in this country. *Dollar Savings Bank v. The United States*, 19 Wallace, 239.

This doctrine is well settled in respect to the State governments; more particularly by *Commonwealth v. McGovern*, 4 Bibb, 62; *Leake v. Ferguson*, 2 Grattan, 436; and *Commonwealth v. Baldwin*, 1 Watts, 54. Authorities might be multiplied if it were necessary.

It might not be necessary, in respect to recent judgments in favor of the United States, to resort to a bill in chancery for the enforcement of them upon real estate. But where they have been standing for any length of time, and junior liens have supervened, I think the proper method of proceeding is the same as would be proper in respect to judgments in favor of citizens,—that is to say, by bill,—and that such a course has been properly taken in this case.

*United States District Court, Eastern District of Virginia, at  
Richmond, April 30th, 1878.*

J. W. DIXON v. E. BARNUM'S ADMINISTRATOR.

A discharge in bankruptcy is only a personal release of the bankrupt from a debt, and does not release any lien of the debt upon property ; and such property may be subjected by a State court to the lien when the property does not form part of the assets in bankruptcy, or, by the bankruptcy court when it does, if it comes, after the discharge, again into the possession of the bankrupt.

THIS was a bill of injunction filed in the United States District Court, on its equity side, to enjoin the defendant from interfering with certain real estate of the complainant which he had sold before his bankruptcy while it was subject to a debt of the complainant, and had repurchased some years after the discharge in bankruptcy ; the lien of the debt to which it had been subject not yet having been satisfied.

The facts of the case are fully set out by the bill as follows :

Some time in the year 1869, John B. Donovan, administrator of E. Barnum, deceased, along with other persons, filed a bill in the Circuit Court of Matthews County to subject the real estate of your orator to the payment of certain judgments which had been obtained against your orator. The cause proceeded regularly, and at the March Term of the Circuit Court of Matthews County, 1878, a decree was entered against your orator requiring him to pay to John B. Donovan, administrator of E. Barnum's estate, the sum of one hundred and eighty-four  $\frac{8}{100}$  dollars with interest on seventy-eight  $\frac{40}{100}$  dollars part thereof, from the 15th September, 1877, until paid. Your orator prays that your honor will interpose and give him relief for the following reasons, viz. : On the 27th day of December, 1867, your orator sold and conveyed to one Fountaine Green, all the real estate of which your orator was possessed ; in March, 1868, your orator filed his petition in the United States District Court, to be adjudged a bankrupt, and in a few months obtained his discharge in bankruptcy. On the 9th day of December, 1868, your orator purchased the said land from Fountaine Green, and soon thereafter the suit above referred to was instituted in Matthews Circuit Court. 'Tis true the judgment in favor of Barnum's administrator was obtained in April, 1861, but it was not docketed until September 4th, 1868, eight months after your orator sold the land to Fountaine Green,

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and four months after your orator had filed his petition in bankruptcy. Certain it was that Fountaine Green was a purchaser for valuable consideration and without notice. In the meantime your orator having obtained his discharge, certainly it was his right to purchase real estate, and the real estate thus acquired after *discharge*, could not possibly be liable for any judgments against your orator, obtained before he filed his petition in bankruptcy. The land now owned by your orator has been decreed to be sold to pay off and discharge this judgment in favor of John B. Donovan, administrator of E. Barnum, deceased, and Sands Smith, of Matthews County, has been directed to execute the decree.

Your orator states and so charges the fact to be, that this honorable court should protect him in those legal rights guaranteed to him in pursuance of his *discharge*, and should protect him in his after-acquired property.

In tender consideration whereof, etc.

In the suit in the State court thus alluded to by the bill, the judge of that court had filed the following opinion on the question of law on which the case turned. There were two suits in that court precisely the same, and this opinion was filed in one for both :

MONTAGUE, J.—This is a bill filed by the plaintiffs to enforce judgment liens against the real estate of John W. Dixon. The following facts appear from the record : That John W. Dixon, by deed, duly recorded in the clerk's office of the County Court of Matthews County, did, on the 27th day of December, 1867, convey to one Fountaine Green, in fee, his entire real estate situated in said county. That after this, and very soon after, he applied for the benefit of the United States bankrupt law, and obtained a full discharge. That the consideration, expressed in the said deed, was two thousand dollars. After the said Dixon was discharged in the bankrupt court, the said Fountaine Green, to wit, on the 9th day of December, 1868, reconveyed said real estate to the said Dixon, in fee ; that before the conveyance by the said Dixon to the said Green, of the said real estate, there were sundry judgments against the said Dixon ; some of the judgments were docketed and some not. This bill was filed at March Rules, 1869, and Dixon never answered the bill till the September Term of Matthews Circuit Court for 1877. In his answer, he makes no other defence than to set up his discharge in bank-

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ruptcy, as a complete and full bar to the plaintiff's demand. Is it a bar, is the only question for this court to decide.

As to the judgments which were docketed before the sale to Green, there is no difficulty. They are liens on Dixon's real estate, and it is liable for their satisfaction. This is conceded by his counsel. But how is it with those not docketed? A judgment is a lien upon all the real estate of the judgment debtor from the time of its rendition. The docketing gives no additional force or validity to the judgment. If not docketed, a *bona fide* purchaser without notice of the judgment is protected. This, as I understand the rule, is the effect of docketing a judgment and nothing else.

When Dixon took a reconveyance of the land from Fountaine Green, did not these liens, though not docketed, still adhere to the land in Dixon's hands? Under all the facts and circumstances in this case, were said liens destroyed, or did they ever cease to exist?

Fountaine Green *quo ad* the undocketed judgments may be treated as a purchaser without notice, and his title good against said judgments; and had he conveyed to any other person than Dixon, might have passed a good title. This he did not do, but reconveyed to Dixon. In Story on Equity, vol. i, § 410, the law is laid down thus:

The *bona fide* purchase, for a valuable consideration, purges away the equity from the title, in the hands of all persons who may obtain a derivative title, except it be that of the original party (which in this case is Dixon), whose conscience stands bound by the violation of a trust and a meditated fraud.

In 1st Schoale & Lefroy's Reports, p. 379, that great equity judge, Lord Redesdale said:

So, if Mr. Daly had made a conveyance to another person with notice of the trust, and taken back a reconveyance, this would have operated nothing, it would not have altered the estate; nay, if a trustee conveys to a person who has *no notice* of the trust, and then takes a reconveyance, he having notice, it attaches on him, though it would not on a person not having notice; if a third person had become a purchaser, he would have held discharged of the trust.

In the second volume of the Leading Cases in Equity, in the case of *Bassett v. Norsworthy*, this whole doctrine of subsequent

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purchasers without notice, is fully examined and discussed ; and while it is admitted as settled law, that where one purchases an estate *bona fide*, and for valuable consideration, *without notice* of prior liens or incumbrances thereon, his title is good, and if he sells to another, the title will pass free of the incumbrances or liens, that authority says :

But this principle ceases to be applicable when an estate, bought without notice, is reconveyed to a prior purchaser, who sold in violation of rights, which he knew at the time of his purchase, and whose conscience is still tainted with the original fraud.

This doctrine has been recently approved by our Court of Appeals. They say :

A *bona fide* purchaser of an estate for valuable consideration, without notice, purges away the equity from the estate, in the hands of all persons who may derive title under it, with the exception of the original party, whose conscience stands bound by the violation of his trust and meditated fraud. *Carter v. Allen*, 21 Grattan, 248.

Thus stands the law. Now, does it apply to this case? I think it does. Mr. Dixon sold to Mr. Green, went into bankruptcy, got his discharge, and in *less than one year* Green conveys back to him the land upon which the liens existed at the time of the sale to Green. Dixon knew when he conveyed to Green of the existence of these liens ; he knew it when Green reconveyed to him. He knew it all the time. In such transactions the law requires good faith and fair dealing. Can it be truthfully said that we have this good faith and fair dealing here?

Can just, fair, and *bona fide* creditors thus be deprived of their rights? Can a court of equity aid in such transactions as this? Dixon relies alone on his bankrupt discharge. Will this avail him? This is the next and last question we shall examine.

The bankrupt discharge discharges one personally from all antecedent debts. It is simply a personal discharge. It does not undertake to destroy liens on property ; it simply gives a personal discharge and leaves the liens where it found them. If Mr. Dixon had never gone into bankruptcy, his sale to Mr. Green, and Green's sale to him (Dixon with full knowledge of the liens), the liens would still stand against Dixon's land. We

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have seen that Dixon's selling to Green,—Dixon having, full knowledge of the liens, and Green not,—and then Green's conveying back to Dixon,—Dixon still having knowledge of the liens,—has been declared by our Court of Appeals to be a breach of trust and a meditated fraud. The bankrupt discharge does not cure and purify this fraud. See *Jones's Executors v. Clarke et al.*, 25 Gratt. 667. Dixon was guilty of a constructive or implied fraud by selling to Green, with full knowledge of the judgment liens on his land, going immediately thereafter into bankruptcy; and as soon as he gets a discharge therein, accepts a deed from Green conveying the land back to him—and all this done in less than a year from the time he conveys the land to Green. With these facts shown in the record, can any one say that Dixon did not meditate a fraud upon his judgment creditors? To put it in the mildest form, it is a constructive or implied fraud; and the Court of Appeals, in the last case cited, says a constructive or implied fraud “has precisely the same effect with actual fraud, in regard to the measure of liability therefor,” and most pertinently and forcibly asks, “Why has it not the same effect in regard to his discharge in bankruptcy? Can this question of discharge be made to depend upon the degree of aggravation of the fraud?”

There is to my mind another fact disclosed by the record, which strongly tends to show that this whole transaction was, on the part of Dixon, a breach of good faith and fair dealing, and therefore a “meditated fraud.” The bill was filed at March Rules, 1869, and Dixon never answered it till the September Term of this court for 1877, a period of over eight years; and when he does answer, gives no explanation of the transaction, but simply attempts to screen himself behind his bankrupt discharge. I do not think this can protect him, and am of opinion, that by the facts in this case, the liens on Dixon's land, existing at the time of the sale to Green, have never been destroyed, but still exist in full force, and there may be a decree accordingly.

September 29th, 1877.

On the facts and law of the case thus stated, the United States District Court dismissed the bill on grounds set forth as follows:

HUGHES, J.—In the suit of *E. Barnum's Administrator et al. v. John W. Dixon*, in the Circuit Court of Matthews County, Dixon's deed to Green, conveying the land which the bill sought to subject to judgment liens, was not attacked as fraudulent, but was treated as valid, and therefore it must be so considered by this court. If it was valid, then Dixon, when he came into bankruptcy, had conveyed away all his title, and the land did not become part of the assets in bankruptcy, and the bankruptcy court could not have had any jurisdiction over the land. Not only, therefore, did the land remain charged with any liens that might have been superior to Dixon's deed of conveyance to Green, but the enforcement of such liens remained within the exclusive jurisdiction of the proper State court. It is very true that it would have been competent for the assignee in bankruptcy or any alien creditor to come into this court and attack the deed as invalid by reason of fraud; in which event, this court would have had jurisdiction to try such an issue. If such a bill had been filed and this court had pronounced the deed fraudulent and void, then the land it related to would have become part of the assets in bankruptcy, and this court, on its bankruptcy side, would then have had exclusive jurisdiction to administer it as assets, and to ascertain and liquidate the liens resting upon it. But the deed of Dixon to Green has been all along accepted and treated as valid; and it therefore operated to convey away all of Dixon's title, and therefore the land it conveyed formed no part of the assets in bankruptcy, and was not and is not within the jurisdiction of this court. If it was charged with liens when conveyed by Dixon to Green, it is exclusively for the State court so to decree. It is not competent for this court to consider of that matter. But it is claimed that the discharge of Dixon in bankruptcy operated to extinguish as to him all debts which he owed before the date of his petition in bankruptcy, and that such discharge operated to release the land which he had conveyed away from the lien of the debt to E. Barnum's administrator when the land came back to him by Green's reconveyance.

Let us examine this pretension. The bankruptcy proceeding consists of two branches. The bankrupt surrenders his estate to the court, and becomes *civiliter mortuus* as to it from the filing of

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his petition. The estate comes to the court charged by the bankruptcy law with all liens which were resting upon it. The bankruptcy proceeding then goes on, in one branch as to the bankrupt, and in the other branch as to his estate and the liens upon it. The law requires the bankruptcy court to respect and discharge the liens resting upon the estate, and contains nothing in the remotest degree implying that the estate which had been held by the bankrupt previously to the filing of his petition, shall be exonerated from the liens legally resting upon it. The bankruptcy proceeding, in the branch relating to the bankrupt himself, is purely *personal*, and the discharge in bankruptcy is simply a personal exoneration of the bankrupt from the debts which he had owed. Even the assets which he brings into bankruptcy are charged with all liens existing against them, and if they are sold after his discharge (a thing not unusual), and he becomes the purchaser of such of them as are incumbered with liens, he takes them subject to the liens of the very debts from which he is personally discharged. If this be so by the express terms of the bankrupt law, as to property which he brings into the bankruptcy court, how much more certainly is it so as to property which, by fraud or contrivance, or even by honest transfer, he has managed not to surrender in bankruptcy. The discharge in bankruptcy is merely personal as to the bankrupt, and does not affect his estate. If the estate is subject to liens, the personal discharge of the bankrupt does not operate to release it from the liens. The bankrupt cannot, by conveying away any part of his estate before filing his petition, discharge it of liens which would be enforced against it if it came into bankruptcy. That which he thus conveys away may be subjected by State courts to liens incumbering it. That which he brings into bankruptcy will be subjected to liens incumbering it by the bankruptcy court. In either case the lien *in rem* will stand and be enforced, though the debt *in personam* be discharged in bankruptcy. The language of the order of discharge is that John W. Dixon, the bankrupt person, "be discharged from all debts which existed at the filing of his petition;" not that his estate be discharged from the liens of those debts. Documents of this sort mean only what they express, and are not construed to operate beyond the strict effect of

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their terms. When, therefore, a discharge in bankruptcy declares that the said bankrupt, John W. Dixon, is forever discharged from debts and claims due on the day of his petition, it refers to him personally, and cannot be construed to mean that his *estate* is discharged from the liens which incumber it.

As to the more general aspects of this case, I concur fully in the opinion of Judge Montague rendered in the cause in the State court, and will dissolve the temporary restraining order heretofore entered by me, and dismiss the bill in this court.

The case of G. W. Simmons is similar to this one in its general features, and I will dissolve the injunction and dismiss the bill in that case also.

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*In the District Court of the United States, Eastern District of Virginia, at Richmond, May, 1879.*

JAMES H. DOOLEY, TRUSTEE, ETC., v. P. GALLAGHER & CO.

There can be no implied warranty of the quality of goods which have been in existence and in the vendee's custody for some time before the sale, and are in his custody at the time of sale.

*Robert Ould, for plaintiff.*

*John S. Wise, for defendants.*

THIS was an action of trespass on the case brought by James H. Dooley, trustee in bankruptcy of Asa Snyder and Warner Moore, trading as Asa Snyder & Co., against the defendants, P. Gallagher, D. S. Peirce, and William Terry, trading as P. Gallagher & Co.

The declaration contained two counts. The first count averred that August 26th, 1875, at Wythe County, Virginia, Asa Snyder & Co., at the special instance of defendants, agreed to buy 185 tons of charcoal pig iron at \$30 per ton, or \$5450. That

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defendants *by falsely and fraudulently warranting said iron* to be an excellent article of cold-blast charcoal pig metal, suitable for making car-wheels, and that the same was of the first class of such metal, sold said iron to said Snyder & Co. for the price aforesaid, which was afterwards paid. Whereas said iron was not when so sold and warranted what it was represented to be, but was bad and inferior material, unfit for the purpose aforesaid. That the defendants in the sale thereof, falsely and fraudulently deceived Snyder & Co., whereby they were put to great expense, loss, and inconvenience, and the plaintiff was entitled to recover therefor. Snyder made payments on drafts hereafter mentioned.

The second count averred that defendants being possessed of said iron, known as "*Panic*," and *knowing the same to be of inferior and bad quality*, nevertheless fraudulently, falsely, and deceitfully represented it to Snyder & Co. as above set out, and by means of such false, etc., representations induced Snyder & Co. to buy it at the price aforesaid, whereas the iron was not as represented, but was of bad and inferior material, unfit for the purposes above set out, *as the defendants then and there well knew*. And so the plaintiff averred that the defendants *deceived and defrauded* Snyder & Co. in said sale, and plaintiff sued for said deceit.

The defendants demurred to the declaration, plead the general issue to both counts, and asked leave to file special pleas.

At the trial the parties waived the demurrer, and by consent the whole matters of law and fact were submitted to the court, with leave to the defendants to introduce under the general issue any testimony, and to make any defence which could be made by special plea.

It appeared from the evidence introduced on the trial that the negotiations leading to this suit were conducted on the part of Snyder & Co. by Asa Snyder, and on the part of the defendants by P. Gallagher. That they had never had business transactions with each other before, and their whole correspondence had been in writing, neither having ever seen the other prior to the day of trial. That in consequence of some newspaper notice of Asa Snyder, Gallagher wrote to him the following letter :

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RURAL RETREAT, WYTHE Co., VA., August 21st, 1875.

ASA SNYDER, Esq.

DEAR SIR: We are now making an excellent article of cold-blast charcoal pig metal, and are desirous of disposing of a lot at as early a day as possible. What can your market afford to do for us?

Brands, as you know, from this Cripple Creek country are fine for car-wheel purposes.

Hoping to hear from you soon,

We remain, yours, etc.,

P. GALLAGHER & Co.

RICHMOND, VA., August 23d, 1875.

P. GALLAGHER & Co.

GENTLEMEN: I have your letter asking information about iron. Please advise me which of the Cripple Creek furnaces you are running. I must know your brand before giving quotations. If your iron is as good as the Wythe I can now sell it here at \$32, four months.

Very truly,

ASA SNYDER.

Advances made of \$25 per ton on consignments if warehoused.

Whereupon Gallagher replied:

RURAL RETREAT, WYTHE Co., VA., August 26th, 1875.

MR. ASA SNYDER, Richmond, Va.

DEAR SIR: In answer to yours of the 23d would say that ours is a new furnace which went into blast on the 9th inst. With reference to the quality of the metal would say that in our judgment it is first class. Our founderer, Mr. Rodenhiser, who worked the furnace ("Wythe") sufficiently long to know the quality of its metal, when asked by us how ours would compare with it, remarked that "the iron of Sayers, Oglesby & Co. ('Wythe') could beat us in nothing, and for general purposes he believed ours the best."

We could send you small quantities to try it. What can four months' paper be discounted at in your city, and will you please inform us what freights have been paid to your city by Sayers, Oglesby & Co.

Yours truly,

P. GALLAGHER & Co.

After sundry other correspondence, the following letter was written:

RICHMOND, VA., January 31st, 1876.

GENTLEMEN: Your letter asking permission to draw was not received till Saturday. This A.M. I am in receipt of your letter of the 29th from Wytheville and Rural Retreat.

The customer to whom I expected to sell has not bought from me; but rather than you should be disappointed, I will take it on

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Statement of the case.

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the terms offered him, \$30, four months. The iron shipped in October I have included in this sale, and will give my paper for it, as of this date, when the acceptance given for that lot matures, etc.

Very truly,

ASA SNYDER.

It appeared that after receiving the acceptances above named, Gallagher & Co. discounted them to the Farmers' Bank of Southwest Virginia ; that the acceptance on the fifty-six tons sent in October was paid, and the first of the three, dated January 20th, January 31st, and February 10th, was paid. The last two were protested, but the bank sued Snyder and recovered them from him before his insolvency.

After the reading of the letters aforesaid the plaintiff introduced one Derbyshire, an employé of the Tredegar Iron Works, who testified that he had been handling iron over twenty-five years, and could tell by breaking a pig and other processes whether a particular iron would suit for car-wheels. That he had no recollection of the particular iron in controversy ; but remembered that on several occasions said Snyder had sent iron to the Tredegar works which on inspection was by him found unsuited to car-wheel manufacture.

Asa Snyder, a witness for plaintiff, testified that his whole correspondence with Gallagher & Co. was embraced in the letters read. That he never had any verbal intercourse with the firm. That he had fifty-six tons of their iron in his possession from October until January 31st, when he bought. That so far as he knew it was of same grade as that subsequently sent. That he made no examination or tests of its quality before he bought. That he is a dealer in pig iron, and has been engaged in iron business for over twenty years. That he bought the iron on the faith of what he regarded as the assurances of Gallagher & Co. in the letters produced, but had no other assurances than they disclose. That he found after buying the iron that it was utterly unsuited to the wants of the market he was supplying, and that customers to whom he sold threw it back on his hands, and he was finally compelled to sell it, a portion at \$21 and a portion at \$16. A claim on the basis of these losses was produced by plaintiff.

## H. DOOLEY v. P. GALLAGHER & Co.

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### Opinion of the court.

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'the defendants, P. Gallagher was introduced, who neither knew nor undertook to state to Snyder the said iron. That his whole representations appear That he originally employed Snyder as his agent of said iron. That Snyder becoming purchaser (Snyder's) own suggestion. That witness debated for before taking Snyder's offer. That the firm of P. O. had sold all their "Panic" iron at from \$32 per ton. Never less than \$26, and then when I greatly declined from what it was when Snyder witness believed the iron as good as any they I not know why it was Snyder had sold so I the iron made by P. Gallagher & Co. was made seek, including this. That he never saw Snyder trial.

*for plaintiff.*

*2, for defendants.*

### OPINION OF THE COURT.

J.—The only question here is, whether there was warranty by Gallagher & Co. that the iron sent to December and January was really of the quality described in the letters of the 21st and 26th August, and of later

the letters were written with a view to selling the iron. They were the letters of consignors to a consignor of a vendor to a vendee. The iron was the first made at a new furnace, and the consignee was so the consignors were confident of the truth of their statements of its quality, but they stated the grounds of their statements, viz, that theirs was "Cripple Creek" iron, a well known and good reputation; and that their founderer, the best brand of the Cripple Creek iron at another time was now making this iron of theirs, pronounced it as good as the "Wythe" iron. They made their statement to a novice in the iron business, but to an expert, and an experienced "dealer in pig irons."

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Opinion of the court.

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They describe the iron as a consignor would to a consignee, and their letters all implied that the consignee was expected to judge of the quality for himself; and they expressly requested him to get his customers to test it. The description of an article, in good faith, to an agent, coupled with a delivery of it to him and a request that he and others shall take measures to inform themselves of its real quality, ought not, it seems to me, to be treated as implying a warranty of quality to any one who might months afterwards and after full opportunity for examination, conclude voluntarily and without solicitation to become the purchaser.

There is no doubt that Snyder himself had confidence in the quality of the iron; and I infer from the evidence that his confidence was founded more on the fact that it was Cripple Creek iron than on other representations of Gallagher & Co. to him. That it was Cripple Creek iron in fact no one disputes, and has not been denied in evidence. That it was really worth from \$26 to \$32 per ton is proved by sales of it to other purchasers in other markets. This consignee, an experienced iron merchant and manufacturer, and a regular dealer in "pig iron," had fifty-six tons of it in his custody for more than four months before his purchase. It had been placed with him for sale coupled with a request to have it tested and tried. After this length of custody and the fullest opportunity of inspection, Snyder voluntarily proposed to purchase outright and unconditionally as to quality, all the iron that Gallagher & Co. had, up to the end of January, consigned to him.

Certainly these are not circumstances from which the authorities allow us to infer a warranty of quality as part of the contract of sale. If Snyder, in his letter of the 31st of January, 1876, proposing to purchase, had said to Gallagher & Co. that he had not tested the quality of the iron, that he relied upon their representations made to him in the August preceding as to quality, and that he made his proposal to purchase on that basis, then an acceptance of his offer by Gallagher & Co. would have created a warranty, for then Gallagher & Co. would have been afforded the opportunity of electing whether or not to sell on such terms at all. It was too late for Snyder to attempt the interpolation of

such a provision into the contract two weeks after his proposal had been accepted, and after Gallagher & Co. had lost control, not only of the terms of sale, but of the iron sold.

Trade could not go on between man and man if bargains once made and executed could afterward be upset on the election of any one of the parties. Commerce would perish under the effects of such a license, and the courts would be crowded with suits.

Unless the warranty is given at or before the time of the sale, it cannot be made to spring up afterwards at the will of either party as attempted here. Nor do I think it can be the policy of the law to hold that representations made to a consignor by a consignee long anterior to a sale, may be treated as representations of a vendor to a vendee, if the consignee in the course of events volunteers to become purchaser. In the first instance they are intended for mere purpose of description, and with no thought of their being made the elements of a future contract. Contracts ought only to be implied from language used in contemplation or in the act of making them.

So much for the equities of this case. Technically it is conclusively against the plaintiff. We must not confound the law of implied warranty in general with the law as it applies particularly to the *quality* of the article sold.

Benjamin lays down the law of *caveat emptor* very strongly as to warranty of the *quality* of chattels. He says:

So far as an ascertained specific chattel, already existing, and which the buyer has inspected, is concerned, the rule, *caveat emptor*, admits of no exception by implied warranty of *quality*.

The rule as to *title* is, of course, different; for the knowledge of title is more or less exclusively in the vendor. So also is the rule as to the *soundness of an animal* different; for the vendor is supposed to be fully informed on this subject, if he has custody and the purchaser has not custody of the animal. So also is the rule different as to chattels *not yet in the custody of the buyer or not yet manufactured*, but sold for future delivery; for there a warranty is implied that the goods will, when delivered, in all respects conform to the sample or description according to which they were purchased. In this case it is not shown or pretended

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Syllabus.

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that the iron delivered in January differed in quality from that delivered in September.

But in the case put by Benjamin, which is our case, of a specific chattel, already existing, and which the buyer has inspected (much more has had in his custody for four months), the rule of *caveat emptor* admits of no exception by implied warranty.

This is not only well-settled law, but it is sound, just, equitable law, and must govern this case. This doctrine is fully established in this State by *Mason v. Chappell*, 15 Grattan, 572.

It governs not only the sale of January, but also the consignments made before that time, and the acceptances given on the consignments. The finding of the court and the judgment in the case must be for the defendants.

A finding may be drawn in accordance with the facts, and a judgment entered for the defendants.

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*In the District Court of the United States for the Eastern District of Virginia.*

JAMES H. DOOLEY, TRUSTEE IN BANKRUPTCY OF ASA SNYDER AND WARNER MOORE, INDIVIDUALLY, AND AS THE FIRM OF ASA SNYDER & CO., BANKRUPTS, v. THE VIRGINIA FIRE AND MARINE INSURANCE COMPANY ET AL.

Negotiable promissory notes, ranking as a first lien upon real estate, were deposited in bank by the payees for collection on their account. As they fell due they were paid by the maker (now the bankrupt), who used funds of a loan and insurance company for the purpose, and who afterwards gave the notes to the company accompanied by writings, stipulating to pay two per cent. more than the legal rate of interest which the notes had borne, and also stipulating that the company should hold the notes as a first lien upon the property on which they had been secured, in the same manner as the payees of the notes had held them; all of which was without the knowledge or privity of the payees, who had collected the amount of the notes.

## **v. FIRE AND MARINE INSURANCE Co.**

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### **Statement of the case.**

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were extinguished, as such, when paid; that the obligor of them to the company was represented by the stipulation which he had given it, and that these stipulations were of different tenor, form, and terms from the notes which had been first liens upon the property on which the notes were given, in the same manner in which the notes had been.

on which the liens mentioned in the proceedings of a lot of ground in the city of Richmond, on brick foundry and other buildings.

It was purchased on the 3d of December, 1872, individually, from the firm of Dunlop, Moncure & Co., conveyed to him on that date. The sum of \$10,000 in cash, and for the balance of the purchase-money he executed his five negotiable notes, all dated December 1st, 1872, payable as follows, for the respective amounts

one year after date, for \$2230.15.

two years after date, for \$2127.22.

three years after date, for \$2024.29.

four years after date, for \$1921.36.

five years after date, for \$1818.43.

These notes were all calculated at the legal rate of six per cent. according to the laws of Virginia.

The property was secured by deed of trust upon the property mentioned, bearing even date with the notes. The deed was duly recorded, and constitutes the first lien upon the proceedings mentioned. The controversy is as to the first, second, and third notes, which are now in the hands of the Virginia Fire and Marine Insurance Company, the note having been taken up by that company, the fourth and fifth notes are still held by Dunlop, Moncure & Co., being valid liens upon the property.

As regards the first three notes are as follows:

The first note having been placed in bank for collection by the bank of & Co., and Snyder, the maker, being unable to pay when it fell due, he obtained from the Virginia Fire

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Statement of the case.

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and Marine Insurance Company their check for the amount of the note; giving his own note for ninety days, to bear 8 per cent. interest, upon the understanding that the Virginia Fire and Marine Insurance Company were to hold the original note against the real estate in the same relation that Dunlop, Moncure & Co., the original holders of the note, sustained in the trust deed. This understanding, however, was only known to Snyder and the company. This check of the Virginia Fire and Marine Insurance Company, dated December 6th, 1873, was deposited in bank by Snyder to his own credit, and checked upon by him December 6th, 1873, for the amount of the note; which was thus taken out of the bank by Snyder, and then delivered to the Virginia Fire and Marine Insurance Company, in compliance with the understanding, Dunlop, Moncure & Co. having nothing to do with the transaction. Ninety days afterwards Snyder executed the paper dated December 6th, 1873, filed with the depositions and marked *A*, in which he recited the circumstances, and agreed that the note should be secured by the deed of trust and should bear eight per cent. interest per annum. The facts in relation to the second and third notes are substantially the same. The second note was allowed by Dunlop, Moncure & Co. to be renewed for thirty days, at the end of which period it was taken out of bank and turned over to the Virginia Fire and Marine Insurance Company, in the same manner and upon the same understanding and agreement as the first note, except that the agreement marked *B*, was executed on the day of the maturity of the note, and the money was advanced for no particular time.

The third note also was transferred to the custody of the Virginia Fire and Marine Insurance Company in like manner essentially with the second note, the only difference being that this note was not renewed and that the check of the Virginia Fire and Marine Insurance Company was passed and charged to the firm of Asa Snyder & Co., and it does not appear how its proceeds ever went into the possession of Asa Snyder individually. There was a similar agreement made in regard to it, marked *C*.

The register, in his report of liens and their priorities, says:

Upon this view of the facts I am inclined to believe that the Vir-

## Statement of the case.

ginia Fire and Marine Insurance Company are entitled to a lien upon the property in the proceedings mentioned, for the amount of the notes aforesaid, by reason of the deed of trust made to secure the holders thereof, and I do therefore report that the five notes, secured by the deed of trust aforesaid, constitute the first lien upon the property of said bankrupt, Asa Snyder.

The interest on the second and third notes being usurious nothing can be allowed.

The following is a copy of the agreement *A* referred to above, to which agreements *B* and *C* were similar in terms :

This certifies that the Virginia Fire and Marine Insurance Company have advanced to me the sum of twenty-two hundred and thirty  $1\frac{5}{8}$  dollars, with which my negotiable note due this day has been paid to the holders thereof, and the said note has been delivered to the said Virginia Fire and Marine Insurance Company as my obligation for the said sum of \$2230  $1\frac{5}{8}$ , on which I hereby obligate myself to pay from the date hereof, at the option of the said company, interest at the rate of eight per centum per annum so long as the said company shall forbear to collect the said principal sum; the said note is described in and secured by deed of trust executed by me, dated December, 1872, recorded in Richmond Chancery Court clerk's office, and given as part of the purchase-price for real estate on Cary Street in this city, conveyed to me by

Given under my hand at Richmond, this 6th day of December, 1873. [It was in fact executed on the 6th March, 1874.]

ASA SNYDER.

The following were the exceptions taken by the complainant to the report of the register in regard to the three notes :

1st. Because the commissioner reports that the three notes, dated December 3d, 1872, and payable respectively at one, two, and three years after date, for the sums of \$2230  $1\frac{5}{8}$ , \$2127  $2\frac{2}{3}$ , and \$2024  $2\frac{9}{10}$ , are liens under the deed of trust executed by Asa Snyder. The evidence establishes that these notes were all paid at maturity, and the lien for their payment was then extinguished.

2d. Because (even if the first note of \$2230  $1\frac{5}{8}$  is a lien) no interest can be allowed thereon. It is shown that the note bore only 6 per centum interest. If paper (*A*) establishes that Snyder after its maturity and payment agreed to pay 8 per centum, surely the excess of 2 per centum interest would not be secured by the deed, and except on the ground that said excess over 6 per centum is reported as a part of the trust debt. But the law existing at the time (March, 1873) allowed only an excess over 6 per centum interest which may be agreed upon by the original parties to the contract, and be specified on the bond, note, or other writing, evidencing the

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Opinion of the court.

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debt. Sec. 4, p. 329, acts 1872-3. Sec. 5 provides for forfeiture of all interest if more than legal interest is contracted for. This defendant in one breath claims that this original obligation is unpaid. If so, it bore only 6 per centum interest, because no greater rate is specified in the note. In the next breath it claims that paper (A) shows a contract to pay 8 per centum interest on the amount of this note, which is recited to have been paid to the holders thereof.

If the first pretension is true, the debt is due on the note and bears 6 per centum interest. A greater rate is stipulated for, but not on the face of the note, and therefore no interest can be collected. If the last pretension is true, viz., that the obligation to pay arises from paper (A), the debt is not secured by the deed.

*Ould and Carrington, for the complainant.*

*Sands and Carter, for the defendant.*

On the case as thus presented the following was the decision of the court :

HUGHES, J.—These exceptions raise a question between different lien creditors of the bankrupt, and not between the Virginia Fire and Marine Insurance Company and the bankrupt. I can treat it only as between different lien creditors.

The three negotiable notes which are the subject-matter of this controversy were due from Snyder to Dunlop, Moncure & Co. They were never indorsed to a third person by the payees. They remained to the date of their maturity evidences of indebtedness from Snyder to Dunlop, Moncure & Co., the payees named in them.

They could become evidences of indebtedness from Snyder to a third person only by the payees' indorsement of them before maturity, or their assignment of them after maturity. They were not indorsed over by Dunlop, Moncure & Co. They were placed in bank by them for collection on their own account. They *were* so collected by the bank on account of Dunlop, Moncure & Co. As to Dunlop, Moncure & Co. they were *paid*. As to the payees holding the notes at maturity they were *paid*. The checks which were used for paying them were presented by Snyder; and the notes were delivered to Snyder on payment.

As to the only persons having the property in the notes at the time of their maturity, the notes were *paid*. If they, as notes, were paid to the only persons having a right to demand payment when they became payable, they were paid as to all the world. When received from the bank by Snyder they ceased to be notes due according to their tenor. They ceased to be obligations to any one according to their tenor. They ceased to be the property of the only persons who could own them, as obligations of Snyder according to their tenor; and they became the property of Snyder, not as his notes due according to their tenor and purport, but only as vouchers or evidences of a past transaction and an extinguished debt. As to effect of payment, see Daniel on Negotiable Instruments, 250-3; Byles on Bills, 262; Story on "Notes," § 453; *Clevinger v. Miller*, 27 Grattan, 740; *Bank v. Winston*, 2 Brockenhough, 254.

If they had not been paid at maturity, they would have remained the property of Dunlop, Moncure & Co.; and then Dunlop, Moncure & Co. might have assigned them to a third person. But they had been paid, and on their payment it had ceased to be competent for Dunlop, Moncure & Co. to assign them to a third person. The payment of them destroyed Dunlop, Moncure & Co.'s privity and property in them. They were never assigned by Dunlop, Moncure & Co., who were the only persons competent to assign them, and as evidences of debt according to their tenor, from Snyder to Dunlop, Moncure & Co., they were extinguished on the dates of their maturity.

The present obligation of Snyder to the Virginia Fire and Marine Insurance Company arises upon the papers of which exhibits *A*, *B*, and *C* are copies. If Snyder's obligation to the Virginia Fire and Marine Insurance Company could have rested upon the three notes in question, then it would have been unnecessary to take these obligations *A*, *B*, and *C*. The fact that it was necessary to take the stipulations, *A*, *B*, and *C*, shows that the notes themselves could not represent an indebtedness from Snyder to the company. The notes were attached to the papers really representing Snyder's obligation to the company only as a part of the *res gestæ* of the new transaction, and as explaining the consideration of the new obligations. The checks of the com-

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Statement of the case.

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pany given to Snyder constitute the consideration of the new assumption, the paid notes do not.

The complainant's theory of a *constructive assignment* by Dunlop, Moncure & Co. of the three notes, being implied in their indorsement of them to the bank for collection, is not admissible. The holder of such paper has a right to indorse for collection without being held for the notes if paid or taken up by any one whomsoever acting without their knowledge or privity. An assignment in such a case must be express, so that the payee may assign with or without recourse, as he may choose.

For these and other reasons which might be stated, the exceptions of the trustee to the register's report in regard to the three notes are sustained and allowed.

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*In the United States Circuit Court, for the Eastern District of Virginia, at Richmond, April, 1878.*

L. H. FRAYSER & Co. v. OTIS H. RUSSELL, UNITED STATES  
COLLECTOR OF INTERNAL REVENUE FOR THE THIRD  
DISTRICT OF VIRGINIA.

Though it is true that courts of equity of the United States cannot enjoin an officer of the United States from collecting a tax, yet there are circumstances under which such collecting officers may be enjoined from claiming moneys of citizens and levying for them as if for taxes.

In equity.

*H. H. Marshall, for the complainants.*

*L. L. Lewis, United States Attorney, for the collector.*

The original bill set out the following case :

Your complainants, L. H. Frayser & Co., show to the court that they are engaged in manufacturing tobacco in the city of Richmond, in the State of Virginia, and were so engaged prior to and on the 3d of March, 1875, and ever since. That on the morning of the day

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Statement of the case.

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last mentioned they had in their factory 15,001 pounds of tobacco, which they had manufactured and placed in boxes according to the usage of their business; that they had sold the same to be shipped to purchasers, stamped according to law, and accordingly they applied to the proper officers of the United States at Richmond for the stamps to put on said boxes according to law, bought, paid for the same, and placed them upon said boxes, and then according to contract shipped the same, and placed said tobacco out of and beyond their control. That after the said tobacco was so shipped, and had so passed from under their control, the said Otis H. Russell, collector as aforesaid, named above as defendant, informed them that he claimed on behalf of the United States an additional tax of four cents per pound, amounting to the sum of \$604.04, and required and demanded of your complainants payment of the same, upon the ground that on the night of the 3d of March Congress had passed an act imposing that additional tax; but your complainants no longer had said tobacco. They had lawfully parted with the same, after they had complied fully with all the requirements of the revenue officers of the United States, and paid the cost of stamps provided by law to be put upon said tobacco; and not only in compliance with the law had those stamps been sold to your complainants, but also in accordance with specific instructions of the commissioner of the revenue of the United States, who had directed (prior to that time) the collector to sell the stamps at certain rates, which complainants paid, till further orders, and no such further orders were received by said collector till after your complainants had shipped their tobacco as aforesaid.

That the contract under which they shipped said tobacco required them to ship it stamped according to law, both contracting parties well knowing what the cost of stamps was. With this contract they complied, and the other parties were bound to them only for the amount paid for said stamps. If, then, there is any additional sum to be paid on said tobacco by your complainants, it will necessarily entail a loss to that extent upon your complainants, while, if demanded of them while the tobacco was unsold, the fact that the additional sum was to be paid would properly have been provided for in said contract, so that in any event, under the facts stated, it would be inequitable and unjust to require your complainants to pay a tax on tobacco which they don't own and which they had parted with, after complying with all the requirements of the law, and the regulations of the department controlling such cases.

Your complainants are advised that while they have no right to institute any suit to restrain the assessment or collection of any tax of the United States, they insist that the tax assessed upon said tobacco, while in their possession and their property, has been fully paid, and that the revenue laws of the United States do not contemplate that the United States officers shall continue to assess upon property which has passed from the possession of the original owner, or rather upon *him*, a tax in addition to that which has already been

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Opinion of the court.

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assessed and paid according to law. They insist that this is no assessment of a tax upon *property*; that it is simply an arbitrary demand upon them for a sum of money which they are not bound to pay, because they have not the property so assessed, and in so doing the collector is arbitrarily and illegally and inequitably perverting the authority given him by law, and using the same to oppress and harass your complainants.

And they further state that the said Russell, collector as aforesaid, is threatening to levy, or cause a levy to be made, upon the property of your complainants for the amount of \$604.04, as aforesaid, and unless enjoined will proceed to do so to the great injury of your complainants.

To the end, therefore, that your complainants may be relieved in the premises, they pray that the said Russell, collector as aforesaid, be made defendant to this bill and answer its allegations; that he be enjoined from proceeding to levy upon the property of your complainants, or either of them, or from collecting in any way said sum of money or any part thereof, and also to enjoin any other officer of the United States from so proceeding.

And may it please your honor, etc.

An injunction was temporarily awarded under this bill and was afterwards made perpetual.

After the final order, the United States, by Mr. Lewis, filed a bill of review, on which the court delivered the following opinion:

HUGHES, J.—The bill and bill of review sufficiently show that after certain manufactured tobacco had been properly stamped at the rate of twenty cents per pound, and then sold and transferred to purchasers by the manufacturer, an additional four cents per pound were demanded by the collector, and a levy upon other property of the manufacturer threatened for this four cents. The injunction complained of in the bill of review was granted to prevent such a levy.

It is true that the collection of a tax by an officer of the government cannot be enjoined, and that all taxes due must be paid, and that the person paying them, when wrongfully levied, must resort to a suit against the collecting officer for the recovery of them. And if the collector here had in the first instance required stamps to the extent of twenty-four cents per pound to be placed upon the tobacco mentioned in the bill, and on a refusal to do so by the manufacturer had threatened to seize that tobacco, and in this attitude of the affair a bill of injunction to

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Opinion of the court.

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restrain him had been brought, the court might not have granted the injunction.

But in this case the proper tax had already been paid by the manufacturer, and he had sold and delivered the tobacco on which the tax was due. As to him the matter had been terminated, and he had passed from his ownership the tobacco which had been taxed. The collector's demand upon him afterwards for four cents a pound, which he called an additional tax, was a demand for what this court has solemnly and finally in another case adjudicated not to be a tax.\* Besides, the course for the collector to pursue, even if this latter four cents had been a proper demand as a tax, was marked out to him by section 3371 of the Revised Statutes of the United States. The collector did not take the course directed by law in a case where "the proper stamps" had not been used, and the proper tax had been "omitted to be paid." His threatened levy was for what was *not* a tax; and it was threatened to be made in a manner which set at naught the provisions of section 3371. It was a clear case for the exercise of the restraining power of the court; and was not a case falling either within the letter, or spirit, or intention of section 3224.

There was another ground on which the court felt authorized and impelled to grant the injunction. A case was before it at the time, in which it had become its duty to pass upon the question whether the payment of the tax of twenty cents a pound upon manufactured tobacco, which was required by the law as it stood until 9 o'clock P.M. on the 3d of March, 1875 (the payment having been made in the early part of that day), discharged the tobacco thus stamped of all taxes imposed by laws then in force. This question had been raised by the collector against numerous manufacturers in Richmond, and a multitude of suits were impending, all turning upon this question of law. Although this fact did not appear in the pleadings, yet it was well known to the court, and its desire to prevent a multitude of suits turning upon a question of law then about to be adjudicated, furnished

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\* See *Salmon & Hancock v. Burgess*, 1 Hughes, 356; affirmed in S. C. 7 Otto, 381.

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Opinion of the court.

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a strong inducement to the court to enjoin the collector from making the levy then threatened.

Thus, not merely with reference to the rights of the complainant in the bill, but also as a measure of sound public policy, the court was justified in granting the injunction; and the bill of review will be dismissed.

For like reasons the bills of review in the cases of A. M. Lyon & Co., John K. Childrey, and Robert W. Oliver will be dismissed.

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*United States Circuit Court, for the Eastern District of Virginia,  
at Richmond, 3d April, 1878.*

## UNITED STATES v. GEORGE W. JACKSON ET AL.

On demurrer to a declaration on an official bond of a collector of taxes:

*Held*, That where the bond does not identify the district in which the officer is to act, nor the date of his commission, nor the sort of taxes which the officer was to collect, nor the date of the act of Congress under which the bond was given, and the condition of the bond is that the officer shall faithfully execute and discharge all the duties of "said office,"—in such case the declaration is demurrable and defective.

ON defendant Lewis McKenzie's demurrer to the declaration.

This suit is brought by the United States against George W. Jackson and his sureties, upon a penal bond given May 29th, 1866, for fifty thousand dollars. The condition set out in the bond is in the following words, viz.: Whereas the President of the United States hath, pursuant to law, appointed the said George W. Jackson collector of taxes, under an act entitled "An act to provide internal revenue to support the government, to pay interest on the public debt, and for other purposes;" now, therefore, if the said George W. Jackson shall truly and faithfully execute and discharge all the duties of said office, and shall justly and faithfully account for and pay over to the United States in compliance with the orders and regulations of the secretary of the treasury all public moneys which may come into his hands or possession, etc, then the obligation to be void, etc.

## Opinion of the court

It will be observed that the words "*for the 8th collection district of Virginia,*" which should have followed after the words "*collector of taxes,*" are omitted. So also are omitted the following words or their equivalent, which should have been inserted after those describing the act of Congress under which the bond is taken: "*and in due form of law caused to be issued to him as such, a commission, bearing date the      day of May, A. D. 1866.*"

Indeed, all words are omitted which should have been employed to identify the sort of taxes which Jackson was to collect; the district in which he was to collect them and exercise the office of collector of taxes; and the commission under which he was to act, its date, and either its general purport or precise terms. The date of the act of Congress referred to in the bond is not given. There is nothing to show whether Jackson was to collect taxes in a district yielding millions of dollars of revenue per annum, or in a district yielding next to no revenue at all. There is nothing to show that he was to be collector of taxes for any particular district; but, on the contrary, on the principle, *expressio unius est exclusio alterius*, the bond, in mentioning Jackson generally as a collector of taxes, would seem to exclude the inference that he was to be a collector for a particular district, so as to render inadmissible any evidence showing default as collector in any particular district. A reference in the bond to the commission might have identified the district for which he was collector; but even that is wanting.

There can be no office created by the President of the United States, except by authority of some express act of Congress. There can be no general collection of taxes under the authority, and no general collector of taxes under the appointment, of the President of the United States, because there is no law authorizing such a service or such an officer. All authority to act, and every office exercised, under the government of the United States, must have the sanction of express law.

Even if this were not strictly so, it is difficult to conceive of an office except as limited by some territorial jurisdiction. We cannot imagine a sheriff except as sheriff of some particular county or town, or of a marshal except as marshal of some particular

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Opinion of the court.

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district. The designation of the district is an essential part of the style of such an office as this.

As neither Jackson himself nor his securities can be bound to the United States except by authority of some express act of Congress, let us see whether any act applicable to their bond exists. There may be many other acts, but there is at least one act of Congress whose title corresponds with that set out in this bond, which is the act bearing that title, approved July 1st, 1862. If we assume that the act meant to be described by the words in the bond was an act of Congress, that the government intended to be spoken of in the title of the act given in the bond was the government of the United States, and that the date of the act intended to be referred to in the bond was that of the 1st of July, 1862, and turn to the act entitled "An act to provide internal revenue to support the government, to pay interest on the public debt," etc., approved July 1st, 1862, we shall find that that act nowhere authorizes the appointment of collectors of taxes, generally, but only authorizes (in section 2) their appointment "for each collection district." The words "collector of taxes" generally, used in the bond, described an officer not known to the law, and the bond is void both from uncertainty of description, rendering it impracticable to prove a default by admissible evidence, and as describing an officer not known to the law of the United States, and therefore not capable of making default to the United States.

The demurrer of the defendant, Lewis McKenzie, is therefore sustained.

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Opinion of the court.

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*ed States Circuit Court, Eastern District of Virginia, at  
Norfolk, November 8th, 1878.*

HUNTER & TILLEY v. THE ROYAL CANADIAN INSURANCE CO.

It is a fact that a cause is ready at a term of a State court for the *ex parte* execution of a writ of inquiry by the plaintiff after an office judgment, is not equivalent to its being ready for trial on issues joined in the sense of § 3, of the Act of Congress of March 3, 1875, relating to the removal of causes, which requires a petition for removal to be filed at the term at which the cause "could be first tried."

*H. Burroughs, Esq., for the plaintiff.*

*H. White, Esq., for the defendant.*

THE facts of the case sufficiently appear in the opinion of the court rendered by

WIGGLES, J.—This is an action of covenant on a policy of insurance against fire. The defendant is an alien, resident in Canada. Process was sued out of the clerk's office of Corporation Court of the City of Norfolk on the 3d January,

Service of it was acknowledged by W. H. White, attorney-at-law, as attorney for the defendant, on the 4th of the same month, in pursuance of Code, ch. 36, sec. 20, p. 336, and under that act. The declaration was filed at the succeeding January term, commencing on the 7th day of the month; and a common return was then entered against defendant, who was required to answer and plead to issue at the next rules, which began on the 14th of January, 1878. At these rules, the office judgment was entered, and an inquiry of plaintiff's damages ordered at the next term. That term began on Monday, the 4th of February, 1878. The defendant made no appearance, and the court *ex motu* entered this order—viz., "For reasons appearing to the court, it is ordered that this cause be continued to the next term."

## Opinion of the court.

The next term began on the 6th May, 1878. During this term, the defendant appeared by counsel, and made and filed its petition for a removal of the cause into this court. The Corporation Court of Norfolk refused to grant the motion. 1st. Because the defendant company was, under Virginia legislation, in the judge's opinion, a citizen of Virginia, and, therefore, not entitled to the rights of a non-resident alien; and 2d. Because, in the judge's opinion, the February Term of that court was the one at which the cause (in the language of the act of Congress of March 3d, 1875, relating to the removal of causes) "could have been first tried." Thereupon the defendant sued out of this court a writ of *certiorari* to the Corporation Court of Norfolk, under which the case and the record of it from the State court (or a copy of it) are here.

The reasons which actuated the Corporation Court of Norfolk in refusing the motion of the defendant to remove, are not conclusive with this court. The 5th section of the act of Congress of March 3d, 1875, relating to the removal of causes, confers upon this court jurisdiction to determine whether a cause be or be not properly removed; and the 3d section of the same act forbids the State court, after petition is filed, to proceed any further in the suit, whatever may be its opinion on the sufficiency of the petition, and makes all proceedings there, after petition for removal made and filed, null and void; unless, indeed, and until the cause shall be remanded again to that court, after it has been brought by removal here.

It is for this court to determine whether the cause is properly here. And in determining this point in this cause, the only question seems to be, whether the February Term of the Corporation Court of Norfolk was in fact the one at which "the cause could have been first tried?" For I do not think it can be seriously required of a court of the United States, which is a great power, having obligations towards and relations with foreign powers, founded upon treaties and the principles of international law, to hold with any State court, however authoritative, that the citizen of a foreign country, having rights under treaty and the law of nations, is or can be made, by any local law passed *in invidiam*, a resident citizen of this State, having no rights

## Opinion of the court.

except in that *quasi* character, which character, it is natural to suppose, he denies and rejects. I can't obtain my consent to give any serious consideration to such a pretension, and will confine myself to the single inquiry, whether the February Term of the Corporation Court of Norfolk was the one at which this cause "could have been first tried there?"

In the particular case at bar, an office-judgment by default was entered against an alien defendant, resident a thousand miles distant, upon whom no personal service had been made, twenty-one days after the filing of the declaration at rules, and twenty-four days after service of process upon an agent in Norfolk, who became agent by courtesy. It was a case in which an inquiry of damages was necessary, and does not fall within the provisions of section 45 of ch. 167, pp. 1095-6 of the Code; but it falls within the next following section, 46, which is in these words:

If a defendant, against whom judgment is entered in the office, before it becomes final, appear and plead to issue, it shall be set aside, unless an order for inquiry of damages has been executed; in which case it shall not be set aside without good cause. Any such issue may be tried at the same term, unless the defendant show good cause for a continuance.

Section 1, ch. 173, p. 1117 of the Code, provides how a docket of all cases shall be made up for any term, and requires the docket to be called, and the cases to be *tried* or *disposed of* by the court, at the term, in a certain order.

The Corporation Court, in the present case, at its February Term, of its own motion, "disposed of" it by continuing it, before the execution of the writ of inquiry. The judgment taken in the office could not have become final, except after execution of a writ of inquiry of damages. This writ was not executed, and it could not have been executed, that is to say, the cause could not have been tried, if the defendant had appeared and pleaded to issue, and shown cause for a continuance. Evidently, it was because the cause was not ready for trial, that the court *ex mero motu* "disposed of" it by a continuance. It was incompetent, as it was impossible, for the court, at that term, to determine whether the cause could have been tried, until after the defendant had appeared, pleaded to issue, and shown cause for a continuance.

It is clear to me that the cause was not ready for trial at the February Term of the court. The defendant had not appeared, had not pleaded to issue, and had not shown cause for continuance; all of which privileges the law gave him, and on the exercise of which depended the possibility of a trial. The plaintiff did not put the cause in motion by moving for an inquiry of damages, and did not thereby compel the defendant to appear, plead to issue, and by motion for a continuance, test the question of a possible trial at that term of the court. The plaintiff's power to execute a writ of inquiry which is subject to the statutory right of a defendant to appear, plead, and move for a continuance, does not suffice, of itself, to bring the case within the meaning of the words of the act of Congress defining the term of the court at which a "cause could be first tried." His right to execute a writ of inquiry at the first term after an office judgment has been confirmed at rules, is too contingent, and may be too easily defeated, especially within a month after the commencement of the suit, and especially by an alien defendant, resident a thousand miles off, for a court to infer or presume with any certainty that the cause "could be first tried" at that term.

Chief Justice Waite seems to me to announce the sound rule of decision on this subject, in *Gurney v. The County of Brunswick*, 1 Hughes, 277, when he says:

A cause cannot be tried until in some form an issue has been made up for trial. . . . As soon as the issue is made up the cause is ready for trial. The parties and the court may not be ready, but the cause is. The first term, therefore, at which a case can be tried is the first term at which there is an issue for trial. An application for removal, to be in time, must be made before or at this term.

This language strikes me as eminently judicious. We must consider, not whether the court, or the parties, are ready for trial, but whether the cause itself is ready; and in considering that question, we must know whether the cause is at issue on the pleadings, and is ready for trial with legal certainty, and beyond legal contingency. There was no legal certainty of trial at the February Term of the case at bar. The defendant had, by law, the right to appear, to plead to issue, and to show cause for continuance.

## Opinion of the court.

Judge Drummond, in *Scott v. Clinton and Springfield R.R. Co.*, 6 Bissell, 536, said in a similar case to the present:

But in this case, there was not only no issue when the application (for removal) was made, but there was no answer filed by the parties. It does not appear that there had been any such negligence by those who made the application (for removal), in this case, as to deprive them of the right which was clearly given by the act of Congress of 1875. . . . Now, the cause cannot be heard until there is an issue; and in this case, therefore, it was not competent for the court to try the case, there being no issue before the court to try. And, therefore, I think that within the meaning of the law, a term had not elapsed during which the cause could have been heard. It is to be regretted, perhaps, that the language of the statute upon this subject is not more precise.

I think I am authorized by these two decisions to construe the language of the act of Congress, "the term at which the cause could be first tried," to mean, *the term at which the cause shall be first ready for trial on issues joined*, and to hold that the mere fact that a cause is ready at a term for the *ex parte* execution of a writ of inquiry by the plaintiff after office judgment, is not equivalent to its being ready for trial on issues joined.

The case at bar was not at issue at the February Term. Considering the distant residence of the alien defendant, the court might well, if the plaintiff had gone on and executed his writ of inquiry, have set aside the verdict and awarded a continuance without compelling defendant to plead to issue at that term. But the plaintiff did not do so much as go on and execute his writ of inquiry. Under the provisions of section 46, there was no certainty that he could do so. Under the provisions of that section, even if he had done so, there was no certainty but that his verdict would have been set aside, and the cause continued until the next term, to await the appearance of the defendant, and the making up of the issues in the case for trial.

I must, therefore, overrule the plaintiff's motion to remand on these grounds—1st. That the case was not ready for trial upon issues joined at the February Term, 1878, of the Corporation Court of Norfolk. 2d. That there was no legal certainty that it could have been so made ready by the action of the plaintiff

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Statement of the case.

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if he had taken action for that purpose. 3d. That the plaintiff took no steps by executing his writ of inquiry to reduce to certainty what was uncertain. And 4th. That the Corporation Court, of its own motion, "disposed of" the case by continuance to the next term, without exception by the plaintiff, apparently, because it was not then ready for trial.

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*United States Circuit Court (Fourth Circuit), Eastern District of Virginia, at Richmond, February 6th, 1878.*

UNITED STATES v. MYER MYERS, EZEKIEL MYERS, LATE DISTILLERS AT PETERSBURG, VIRGINIA, AND WM. LOFTIN WILLIAMS, SOLOMON BENJAMIN, AND WM. W. MYERS, THEIR SURETIES.

In a suit by the government on a distiller's bond for the amount of an assessment made by the commissioner of internal revenue under section 3182, Revised Statutes of United States, it is competent for the defendant to produce evidence to show the incorrectness of the assessment, and to contradict it, although he has not first appealed to the commissioner of internal revenue against the assessment.

Where the government, in such a trial, fails to show by positive evidence that frauds (which might as probably or more probably have been committed at the rectifying-house) were committed at the distillery, and the defendant, by all the testimony that could well be brought to establish a negative, shows that the frauds were not committed at the distillery, and that they were probably committed at the rectifying-house, and the jury refuses to find a verdict for the government merely on the presumption that the frauds were committed there, the court will refuse to grant a new trial asked for on the ground that the verdict for the defendant was against the law and evidence.

ACTION of debt. Plea of conditions performed.

This was an action of debt against the late firm of M. & E. Myers, as distillers of spirits, in the second district of Virginia, and their sureties. It was brought for the recovery of \$47,800 claimed for taxes due and unpaid, as shown by an assessment of the commissioner of internal revenue. It was tried on the 22d January, 1878, and a verdict found for the defendants, whereupon the United States attorney moved for a new trial.

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Statement of the case.

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The action was brought to recover an amount shown by an "Assessment List, Special No. 2," to be due for taxes on 68,400 gallons of distilled spirits at 70 cents per gallon, accruing from May 1st, 1874, to February 10th, 1875, amounting to \$47,800. This list is a large folio sheet and contains at the bottom of it a certificate in these words: "I hereby certify that, as authorized and required by law, I have made inquiries, determinations, and assessments of the taxes specified in the foregoing list, and find to be due the amount specified in columns 8 and 9, of said list, from the persons against whose names said amounts are respectively placed. D. D. Pratt, Commissioner. Internal Revenue Office, Washington, November 18, 1875." The taxes thus assessed are claimed to have been due over and above the taxes which were regularly paid by the distillers while they were engaged in business, from May, 1874, to March, 1875.

At the trial the government presented this "assessment list" in evidence, and proved its authenticity. It then insisted that this document was a final "determination" by a competent authority of the amount of taxes still due and unpaid by these distillers, for which they and their sureties were bound; and claimed that it was not necessary on its part to bring forward other evidence to show that the amount of taxes thus assessed and determined was in fact due; and, moreover, that it was not competent for the defendants, by any evidence on their part, to contradict this "determination" of the commissioner of internal revenue.

But the court ruled that in the present trial, and especially as against the defendants, Benjamin and Williams, solvent sureties in the bond of these distillers, this "assessment list" was not conclusive proof of the amount of taxes really due; and that it was competent for the defendants to show, by other evidence, either that the amount assessed was not due, or that no amount was due, or that some other amount, and what, was really due.

After this ruling, the trial proceeded on evidence produced by the parties on each side.

The government showed that there had been found in New York and elsewhere 219,720 gallons of rectified spirits which had come from the rectifying-house of M. & E. Myers; whereas

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Statement of the case.

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they had reported and paid taxes on only 193,119 gallons—an excess of 26,100 gallons, or 607 barrels, thus appearing against them; this excess calling for \$18,270 of taxes more than they had paid, they having paid but \$135,183; whereas there had accrued on 219,720 gallons the gross sum of \$153,800. In short the government showed that 607 barrels had gone from the rectifying-house more than had been reported, and tax paid; on which \$18,270 more of taxes were due than had been paid. But the government produced no evidence to show that an excess as large as 68,400 gallons (equivalent to 1590 barrels) had been actually distilled, except this “assessment list, special No. 2;” or to show that as much as \$47,800 was still due of taxes in excess of the taxes that had been paid.

The defendants produced no evidence in denial of the fact that 607 barrels more of distilled spirits had been sent from the rectifying-house than had been reported at and removed from the distillery. They proved that the rectifying-house was about half a mile from the distillery. They produced the two government storekeepers (one of them the day keeper, the other the night) who were on duty during the period from May, 1874, to March, 1875, who testified that they saw no illicit spirits removed from the distillery; that they would have known of the removal, if it had occurred to any extent; and that they did not believe that there had been any removal. Defendants proved that these witnesses were men of good character. They proved by all the men (save one) who had been employed in the distillery that they had seen no irregular removal, that they must have seen it if it had gone on to any extent, and that they did not believe that there had been any irregular removal. The whereabouts of the single employee not examined was unknown to the defendants. These employees were averred and appeared to be respectable laboring men. Defendants produced evidence tending to show that whatever frauds were practiced were practiced at the rectifying-house; that there was nothing in the regulations of the government to render it impracticable for barrels of rectified spirits to be sent from the rectifying-house containing less, by 5 to 8 gallons each, than called for by the gaugers' marks and stamps; an average short-

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Statement of the case.

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filling of four gallons a barrel on 193,119 gallons (4500 barrels) being 18,000 gallons (418 barrels), which would account for the larger part of the deficiency of 607 barrels charged against them. They adduced evidence tending to show how, in other feasible ways, an additional excess could result between the quantity of spirits dumped from the distillery at the rectifying-house, and the quantity sold from the rectifying-house; and how this could be done consistently with the government's receiving every dollar of the taxes due it on the spirits really distilled; the only fraud practiced being upon the purchasers of the spirits in receiving in the barrels less spirits than the gaugers' marks indicated. They presented evidence to show that all that was necessary to enable the rectifiers to put this fraud upon the public, was that they should be able to influence the government's gaugers in the discharge of their duties; and they presented evidence tending to show that the gaugers who had officiated at their rectifying-house had been as facile as could have been desired, in respect to these matters; and that some of them had been convicted of misdemeanors in connection with this same business.

In short, the evidence of the defendants tended to prove that no frauds had been committed at the distillery; that in fact the government had received the taxes due to it on all the spirits which was actually distilled; that whatever irregularities had been committed had been committed at the rectifying-house; and that, even from these irregularities, the government had sustained no loss of taxes really due to it.

The jury, on the evidence thus briefly described, took the case into consideration, and found a verdict for the defendants.

Whereupon the United States attorney moved that the verdict be set aside as contrary to the law and the evidence. He moved for a new trial on this ground, and also because of the misruling of the court in admitting evidence at the trial in contradiction of the certificate of the commissioner of internal revenue, given in "Assessment List, Special No. 2," to the effect that he had "inquired, determined, and assessed" that \$47,800 was due.

On the 7th February, 1878, the decision of the court on this motion was delivered as follows, by

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Opinion of the court.

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HUGHES, J.—The first question arising upon the motion for a new trial is, whether the court erred in ruling that the “determination” of the commissioner of internal revenue was not conclusive upon the jury in the trial of this cause.

I. The various acts of Congress relating to the internal revenue give ample powers to the revenue officers of the government for the collection of all taxes assessed by law; and the provision which has now taken the form of section 3224 of the Revised Statutes of the United States, prohibits the courts from interfering between collecting officers and taxpayers. The courts are glad to obey this injunction of the law, and are reluctant to interfere with the collection of any taxes assessed by revenue officers. It is necessary to the effective conduct of the government that these taxes be paid as they are assessed; and the courts, whenever they are at liberty to refrain, will refuse to interfere with the collection. It is the duty of citizens to pay the taxes as they are assessed, even though wrong and excessive taxes are levied. Having paid an unjust tax, the law gives the taxpayer a right of action against the collecting officer, to recover back in a court of justice the amount wrongly paid; but it provided, before 1872, that he should first have appealed to the commissioner of internal revenue against the assessment of the local assessor, and that his appeal should have been overruled by that officer. After such appeal and rejection, the law, as it stood before 1872, gave the taxpayer the right to sue the officer who had received the tax for a return of it.

The law of December 24th, 1872, chap. 13, vol. 17, p. 401, Statutes at Large of United States, abolished the local assessors of internal revenue, and consolidated their duties with those of the local collectors. But it provided that assessments should be made in the first instance by the commissioner of internal revenue, and by so doing, as it seems to me, it virtually abolished the provision, that before a suit could be brought by a taxpayer against the collecting officer, he should have first appealed against the assessment to the commissioner at Washington. For, an appeal to an officer who had already made a final determination against him, would seem to be a mockery.

Even, therefore, if this were a suit by M. & E. Myers against

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Opinion of the court.

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the local collector, it would, in my judgment, be competent for them to have shown errors in the "Assessment List, Special No. 2," notwithstanding they might not have appealed from the assessment to the commissioner, and been overruled in their appeal. But this is not a suit of that sort. It is a suit by the government against M. & E. Myers and their sureties; and section 3226 of the Revised Statutes does not apply, even if an appeal to the commissioner of internal revenue as a court of final resort did now lie from a "determination" of this same commissioner as an officer of the revenue. Nor is this present suit one that has been brought in aid of the current collection of the revenue. It was not brought for more than a year after the business of M. & E. Myers ceased. It has not been pressed to trial until nearly three years after that business closed; and the effect of any ruling of the court in the case cannot be to impede or obstruct the prompt collection of the revenue.

I have carefully examined the voluminous laws of Congress relating to the internal revenue, and if there is any provision in them which prohibits a court of the United States, in a suit brought by the government against a taxpayer, from hearing legal evidence on issues of fact without restriction, and from rendering judgment in the course according to the law and the evidence, I have failed to discover it. Certainly no such law has been cited, and I do not believe it to exist.

Moreover, I have looked carefully into all the decisions of the Federal courts bearing upon this subject, and I find nothing in them to prohibit me from going behind "Assessment List, Special No. 2" in this case, except the cases which were cited at the trial by the United States attorney, of *United States v. William Hodson et al.*, 14 Int. Rev. Record, 100; and *United States v. Joseph Black et al.*, 19 Int. Rev. Record, 116. I was much staggered by the able and learned opinion delivered respectively by Judges Hopkins and Shipman, who presided in the trial of these cases; which were actions by the United States against distillers and their sureties, precisely as in the present case; and in which it was held, that, in such actions, the assessment and determination of the assessor was conclusive against the taxpayer, even though there was no express statute to that effect.

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Opinion of the court.

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It seemed to me, in view of well-settled elementary principles of jurisprudence and civil government, that it would not have been competent for Congress to confer judicial functions, in matters of property, upon any officer of the executive department of the government; that judicial functions belong exclusively to the judicial courts of the country, and cannot be divested from the judiciary and transferred to the executive, and that any law to that effect would not only violate that cardinal theory of republican government which keeps distinct, separate, and independent, the executive, legislative, and judiciary departments of government; but would violate the fundamental law of the land (United States Constitution, amendment 5), which provides that no person shall be deprived of his property without due process of law. In the numerous cases which have been decided by the United States Supreme Court, in which that court has passed or could have passed directly or incidentally on this question, although it has studied to promote the prompt administration of the revenue laws, and to avoid placing obstructions in the path of revenue officers; yet it has laid down no such principle and made no such ruling, as that a court when a suit has come properly before it, shall not decide it according to law and the evidence of the case. See *Insurance Company v. Ritchie*, 5 Wallace, 541; *Philadelphia v. Collector*, 5 Wallace, 731; *Nicholas v. United States*, 7 Wallace, 122, 129; *Baltimore v. Baltimore Railroad*, 10 Wallace, 552; *United States v. Wright*, 11 Wallace, 648; *Assessor v. Osbornes*, 9 Wallace, 567; *Peabody v. Starke*, 16 Wallace, 240; *Collector v. Hubbard*, 17 Wallace, 182; *Dandeleit v. Smith*, 18 Wallace, 642; *Pohlman v. Collector*, 20 Wallace, 189; and *Bailey v. Railroad Company*, 22 Wallace, 604.

In the present case the ruling in *United States v. Hodson*, and *United States v. Black*, would have perpetrated a monstrous injustice; for here, the government in its proofs did not pretend that there was an excess liable to taxation of more than 607 barrels of spirits, over and above the quantity on which the taxes were paid; or that more than an additional \$18,270 of taxes remained due; whereas the commissioner of internal revenue, by a purely perfunctory act, no opportunity having been afforded to the defendants for counter proof or appeal, had "determined"

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Opinion of the court.

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that the excess was 1590 barrels, calling for an additional tax of \$47,800. Certainly the sureties of M. & E. Myers ought not, on the palpably erroneous determination of an executive officer in Washington, to be held accountable for nearly 1000 barrels of spirits, and made to pay nearly \$30,000 of money which the government itself has offered no proof to show that they are accountable for. No case could be presented of a greater injustice resulting from a vicious ruling than the one now under consideration; and, even if I could find no warrant in the authorities for doing so, I should feel constrained to overrule the cases of Hodson and of Black, on principle.

But since those cases were decided the Supreme Court of the United States has ruled in a manner which I conceive to have been more consistent with the requirements of the ancient tenets of English jurisprudence. The case of *Clinkenbeard v. United States*, 21 Wallace, 65, was, like the present one, an action of debt on a distiller's bond where there was a plea of conditions performed. This very question of the conclusiveness of an assessment had been raised at the trial below; and the judge who had presided in the Circuit Court had ruled that the assessment, not having been appealed from, was *res judicata*, and conclusive; and that the defendant was precluded from showing to the contrary. The case arose before the law of December, 1872. It arose while assessments were made by local assessors; while liberal provisions of law allowing taxpayers an appeal and a hearing before these local assessors previously to the collection of taxes, were in force; and while taxpayers were allowed, besides an appeal to the local assessor, a right of final appeal to the commissioner of internal revenue. Well might the law, after making these careful provisions (all now swept away) for the protection of taxpayers against unjust assessments, go on then to command that they should pay the taxes when thus settled, and forbid them to sue for their return until final appeal had been taken to the commissioner.

The case of *Clinkenbeard v. United States* was a suit by the government on a distiller's bond given in 1868; and, as has already been stated, it had been contended by the government, that, no appeal having been taken to the commissioner by the

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Opinion of the court.

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distiller, from the assessment sued for, the defendant was precluded from showing that the assessment was erroneous. But the Supreme Court, after drawing the obvious distinction between a suit by a taxpayer which could not be brought until after appeal, and a suit by the government, said :

No statute is cited to show that the defendant cannot when sued (by the government), set up the defence that the tax was illegally assessed, although he may not have appealed to the commissioner. . . . The decisions of an assessor, like those of all other administrative commissioners, are of a *quasi* judicial character, and cannot be questioned collaterally, when made within the scope of their jurisdiction. But, if they assess persons, property, or operations not taxable, such assessment is illegal, and cannot form the basis of an action at law for the collection of the tax, however efficacious it may be for the protection of ministerial officers charged with the duty of actual collection by virtue of a regular warrant or authority therefor. When the government elects to resort to the aid of the courts, it must abide by the legality of the tax. When it follows the statute, its officers have the protection of the statute, and parties must comply with the requirements thereof before they can prosecute as plaintiffs.

This decision settles the law of the present case, and the objection of the district attorney to the action of the court in admitting evidence to contradict "Assessment List, Special No. 2" is not well taken, and furnishes no ground for setting aside the verdict.

II. As to the facts, there is less reason for setting aside the verdict. The affairs of this distillery have been before me so often, that I have learned to be pretty familiar with the facts of the case. There were two trials before me of the libel for the forfeiture of the distillery, and I believe I have tried one or two of the indictments against the government officers officiating at the distillery and rectifying-houses of M. & E. Myers. We also went through the trial of this case the other day. I can therefore speak with some confidence of its facts.

There is no doubt but that the government has proved that M. & E. Myers sent to their customers in several places 607 barrels of spirits over and above the quantity on which they paid the proper taxes ; that is to say, the government proves that they

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paid taxes on about 193,119 gallons of spirits, and they sold to their customers about 219,220 gallons.

There is, therefore, but one single matter open to doubt. Did they commit these irregularities as rectifiers or as distillers? As rectifiers, did this excess of 26,100 gallons (607 barrels) represent additional proof spirits sold, upon which taxes were justly due, or did they represent merely the short-fillings of barrels refilled from the rectifying-house, and other frauds practiced by M. & E. Myers on their customers?

The government has failed to produce any evidence proving affirmatively that any irregularities occurred at the distillery. It has failed to show any positive facts occurring on the distillery premises, which could raise a suspicion of the practice of irregularities there. And the defendants have proved as abundantly as there can be proof of a negative that no irregularities were committed there. The only question of evidence, therefore, is, whether the single fact of the existence of 607 barrels in nominal excess of the quantity on which taxes were paid, is a sufficiently strong presumption to warrant the conclusion that the fraud was practiced at the distillery. Two or three juries, who have had this issue of fact before them, have refused to find a verdict on this presumption; and I think they were right in doing so.

Circumstantial evidence is in some cases even stronger than direct testimony; but experience has shown that it is never reliable, unless subjected to certain tests. One of these tests is, that the fact which it goes to establish shall be inconsistent with every reasonable theory which can be conceived in contradiction of it. Is that the case here? I think not. No one who has heard the evidence upon which the jury found for the defendants, can fail to have recognized, not only the possibility, but the probability, that the irregularities indicated by the re-use of 607 barrels, which had been removed regularly from the distillery, was effected by the connivance of the gaugers, and by manipulations at the rectifying-house. My own mind came to that conclusion, after the second or third trial of these Myers cases in this court; and I have concurred with the juries in their reluctance to find verdicts

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Statement of the case.

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against the distillery, and against these people as distillers, on the mere presumption that the fraud was committed at the distillery.

In this conviction I believe that the verdict of the jury was in accordance with the evidence, and I must decline to award a new trial. I am well persuaded that no jury will ever find a different verdict.

*L. L. Lewis, United States Attorney, for the United States.*

*John S. Wise and John Lyon, for the defendants.*

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*United States Circuit Court, District of South Carolina.*

W. H. MAULDIN, OF SOUTH CAROLINA, v. JESSE CARLL, OF  
NEW YORK.

Whether an attachment can issue from a court of the United States against the property of a citizen of another State, he not being in the State, at the suit of a citizen of the State.

THE case was a suit brought for the recovery of damages for an alleged breach of contract in the purchase of a cargo of lumber. In accordance with the practice of the State court, which has been held to have been carried into the United States court by force of the provisions of the act of Congress of 1872, the process by attachment has been heretofore referable to any United States court since that enactment in suits of that character.

In the case before the court warrant of attachment was issued to the marshal, who arrested the schooner Frances and her cargo at Georgetown, S. C., seeking to attach the interest of Jesse Carll, a part owner of the vessel and the defendant in the action. The provisions of the 1st section of the act of 1875 re-enacted the law of 1789, which reads as follows:

No civil suit shall be brought before either of the said courts against any person by any original process or proceeding in any other

Order of court.

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district than that whereof he is an inhabitant, or in which he shall be found at time of serving such process, or commencement of such proceeding, except as hereinafter provided.

It was contended by Mr. Connor, counsel for the plaintiff, that the language of the 8th section would cover his attachment process. This section reads as follows :

When in any suit commenced in any Circuit Court of the United States, to enforce any legal or equitable lien upon or claim to, or to remove any incumbrance, or lien, or claim upon the title to real or personal property within the district where such suit is brought, one or more of the defendants therein shall be inhabitant of or found within the said district, or shall voluntarily appear thereto, it shall be lawful for the court to make an order directing such person to appear, plead, answer, or demur, etc.

Messrs. Simonton & Barker, who represented the vessel attached, contended that the legal or equitable lien upon or claim to incumbrance or claim upon the title to real or personal property, contemplated by the 8th section, must exist before the suit brought for its enforcement, and could not be created by or in said suit. After hearing argument Judge Bryan decided that he was controlled by the language of the 1st section of the act, but expressed himself dissatisfied with the conclusions to which his mind was forced by the words of the statute.

On motion of Messrs. Simonton & Barker the following order was signed :

*United States of America, District of South Carolina, Fourth Circuit.*

W. H. MAULDIN, A CITIZEN OF SOUTH CAROLINA, v. JESSE CARLL,  
A CITIZEN OF NEW YORK.

It appearing to the court that a warrant of attachment in the above-entitled cause has been issued by the clerk of the Circuit Court, together with a summons and complaint in a civil suit for damages for an alleged breach of contract directed against the defendant, and that under said warrant the marshal of the United States has seized, or attempted to seize, the schooner Frances, lying in the port of Georgetown, South Carolina, with her cargo on board, ready to sail ; that said seizure has been made, or attempted, on the ground of an alleged interest of the defendant, Jesse Carll, as part owner in said schooner ; it also appearing that the defendant, Jesse Carll, is not an

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Statement of the case.

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inhabitant of this district, or found here at the commencement of such proceedings.

After hearing argument of counsel on a motion to set aside said proceedings as not warranted by law, the court being of opinion that the first section of the act of Congress, approved March 3, 1875 (entitled an act to determine the jurisdiction of the Circuit Courts of the United States, and to regulate the removal of causes from State courts and for other purposes), forbids a civil suit to be brought in the Circuit Court of the United States against an inhabitant of another district and not found within the district at the time of commencing the proceeding, and that the suit above stated is not within the exceptions of the act of 1875, as therein provided, now on motion of Simonton & Barker :

It is ordered, that the warrant and summons and complaint be, and the same are hereby set aside, and the marshal do forthwith release the said schooner Frances and her cargo. It is further ordered, that each party pay his own costs.

May 18, 1878.

GEO. S. BRYAN,  
U. S. Judge District S. C.

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*United States Circuit Court, Eastern District of Virginia, at  
Richmond, November 25, 1878.*

AMERICAN BASKET CO. v. FARMVILLE INSURANCE CO.

Where the beneficial title remains in the insured, the fact that the naked legal title outstands in another does not vitiate a policy of fire insurance requiring that the insured should be "entire, unqualified, and sole owners for their own use and benefit."

An oath to such ownership is not falsified by the title being in another, where the oath is made in good faith.

THE plaintiffs brought an action of *assumpsit*, as provided by the Code of Virginia, on a policy of fire insurance, claiming \$1750 damages.

They are a corporation of the State of Connecticut. The defendants are a corporation of Virginia. The property insured and burnt was in the State of Delaware, at a place called Milford. Myers was a regular insurance agent in the State of Delaware, resident in Delaware City, and in this matter was the agent of the

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Statement of the case.

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defendants. Williams was a resident of Milford, and a solicitor of insurance business for Myers. The property was insured through the agency of Myers; and the "*application*" of plaintiffs for insurance, which was signed by an officer of the plaintiffs, was a printed form of questions and answers, in which the answers were written in the handwriting of Williams.

Evidence was given by the plaintiffs tending to prove that full explanations of the condition of the title of the property at or before the time when the application was written out were given. It was proved that the property was bought and paid for in full by the plaintiffs, and that they were in undisputed possession and use of it. But the record-title was in Orrin E. North, an officer of the plaintiff company; in consequence of a law of Delaware which forbade a foreign corporation from holding real estate in that commonwealth.

In the application, in the answer to the question, "In whose name is the title to the property" insured? it was stated, in the handwriting of Williams, it was "in the name of the American Basket Company." In the "proof of loss," made out after the fire, and signed by an officer of the plaintiffs, in answer to the question, "Did the building stand upon leased premises?" the answer, written in Myers's handwriting, was "No—held in fee." The policy contained a clause of forfeiture in the event of false swearing in the proof of loss; another clause requiring a full disclosure of the ownership in the application; and the "entire, unconditional and sole ownership in the property insured for the use and benefit of the assured." It contained no clause of forfeiture by future incumbrances; but did contain a provision voiding the policy if "any change should take place in the title or possession of the property by voluntary transfer" or other specified methods. During the period of insurance, and some four months thereafter, the plaintiffs caused Mr. North to make a deed of mortgage of the property for securing a considerable debt. The plaintiffs' witnesses testified to the solvency of their company.

These were the principal facts of the case, and upon them the counsel on both sides asked instructions. The court modified and condensed these, and gave a preliminary opinion as follows:

HUGHES, J.—Policies of insurance, like all other written contracts, must be construed and enforced according to their terms. If they convey a plain, practical meaning, that meaning must be carried into effect.

Policies of insurance differ somewhat from other contracts, however, in respect to the rules of construction to be applied to them. They are unipartite. They are in the form of receipts from insurers to the insured, embodying covenants to compensate for losses described. They are signed by the insurer only. In general the insured never sees the policy until after he contracts and pays his premium, and he then most frequently receives it from a distance when it is too late for him to obtain explanations or modifications of the policy sent him. The policy, too, is generally filled with conditions inserted by persons skilled in the learning of the insurance law and acting in the exclusive interest of the insurance company.

Out of these circumstances the principle has grown up in the courts that these policies must be construed liberally in respect to the persons insured, and strictly with respect to the insurance company. See *Insurance Company v. Wilkinson*, 13 Wallace, 232.

Another rule of the law in regard to fire insurances is to discourage *wager* policies; that is to say, policies taken by persons who have no interest in the property insured, and in which such persons merely *bet* that the property will not be burned. Such insurances are contrary to public policy and promote fires. The law will, therefore, give force to all provisions in policies of fire insurance which requires that the person who takes out the policy shall have an interest in the property, and shall disclose that interest with precision in his "application" for insurance. That is the purpose of the law, and is the object sought to be subserved by the insertion of clauses voiding them in cases where deception is practiced in regard to the real ownership of the property insured; and terminating them whenever, during the period of insurance, the person holding a policy ceases to own the property, and it becomes thereby a *wager* policy. Therefore, clauses in policies requiring a truthful statement of the interest of the applicant for insurance, and forbidding changes of ownership dur-

## Opinion of the court.

ing the period of insurance, are to be construed not technically to the prejudice of the policy-holder, but rationally and fairly to protect the insurance company from the extraordinary risks, and from the certain and numerous losses which would fall upon them from insurance of property not actually owned by the persons insured.

In the case under trial there are two questions, which have formed the subject of contention between counsel, and upon which instructions are asked of the court.

I. The first is, whether plaintiffs' right to recover is defeated by the fact that the record-title could not be held by the plaintiffs under the laws of Delaware, and was therefore vested in Mr. Orrin E. North, if not made known to the defendant or its agent at the time of the insurance of the policy, considered in connection with the statement in the application for insurance that the title was "in the name of" the plaintiffs. I am of opinion that it is not defeated by that fact if the plaintiffs were the "entire, unqualified, and sole owners" of the property insured "for their own use and benefit." I do not think that the fact of the record-title being in Mr. North of itself defeats their right to recover, unless their statement in the application was made to deceive and mislead the insurance company. The evil sought to be avoided by those provisions of the policy requiring a correct statement of the plaintiffs' interest in the property was the insurance of property not *owned* by the holder of the policy, the destruction of which would not cause a loss to that holder equal to the value of the property destroyed. If the plaintiffs in the case at bar were the owners of the entire beneficial interest in the property at the taking out of the policy, and would have been losers to the full extent of its value if it had been destroyed, then this ownership fulfilled every purpose which the provisions of the policy in regard to a disclosure of interest were designed to secure, and, in the absence of fraud or fraudulent misrepresentation, a merely technical difference in the title, set out in the application, ought not in equity and good conscience to defeat the plaintiffs, if they are otherwise entitled to recover.

The question for the jury in this point is, therefore, whether the statement in the "application" for insurance that the title

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was in the "name of the American Basket Company" misled the defendant or its agent, and was intended to do so. If they think not, it is my opinion that the fact of the record-title being in Mr. North does not of itself defeat the action, if the plaintiffs are otherwise entitled to recover.

In this same connection I will consider the statement on oath in regard to the title made in the "proof of loss." The same rule of law as to the real ownership of insured property, which has been explained, applies here. If the person holding the policy swears that he was owner of property destroyed by fire, of which he was not in fact the full and sole beneficial owner, the fact that he was not owner proves that his policy, contrary to its carefully-expressed provisions, had been a *wager* policy, and defeats his right to recover; and this the more justly because he has practiced a fraud, and has added perjury to his fraud.

It is for the jury to say from their view of the evidence whether the full beneficial ownership of the property destroyed in the case on trial was or was not in the plaintiffs; whether or not this ownership had been divested at the time of the fire by the mortgage deed of 18th of September, 1876, or by any other transfer, so as to render the statement on oath made by the plaintiffs' agent in the "proof of loss" that they were, such fraud or false swearing as is contemplated by the clause in the policy relating to that subject. Unless they believe that such fraud was practiced and such false swearing committed, the plaintiffs' action is not defeated by the statement in regard to the ownership and title in the proof of loss.

II. The second question of contest is in regard to the effect of the mortgage executed on the insured property by the plaintiffs on the 18th of September, 1876. The authorities on the subject are conflicting in cases where the policy does not provide against future incumbrances, the Supreme Courts of some of the States deciding that the execution of a mortgage deed of itself violates the provisions usually found in insurance policies as to transfer and alienation of property during the period of insurance, and those of other States deciding that it is only after divestiture of title and ownership by foreclosure or otherwise that such result occurs.

I am not aware of any decision of the Court of Appeals of

## Opinion of the court.

Delaware or Virginia, or indeed of the Supreme Court of the United States, determining the law of this subject, and must act in the case at bar upon my own views of the law and equity of the case.

And it seems to me that the provision in the policy now sued upon, forbidding any change in the title or possession of the insured property during the period of insurance, should be construed with reference to the cardinal object sought to be subserved in all provisions designed to prevent persons not having an interest and ownership in property from taking out policies, and to prevent insured persons who cease to have an interest and ownership in property from continuing to hold such policies.

So that the inquiry for the jury is whether or not the mortgage of September, 1876, operated to deprive the plaintiffs of their ownership in the insured property, so that, if it was burnt, their loss would be to the extent of the full value of the property destroyed. If, therefore, a person who is insolvent, and so much so as to be hopeless of reinstating his affairs, mortgages his property and thereby ceases to have any real interest in it as owner, so that his loss, if it is burnt, would be merely nominal; or if, after mortgaging, he makes default, and a foreclosure and divestiture of his title and beneficial interest ensues, there is, in either case, such a change in the ownership as renders the policy as to him a *wager* policy, and as defeats his right to recover in the event of fire.

But if the mortgagor remains solvent and thereby remains the sole beneficial owner of the insured property, and would sustain a loss, in the event of fire, to the full extent of the value of the property destroyed, then such a mortgage does not work such a change in the "title or possession" of the property insured as to defeat the plaintiffs' action, if they are otherwise entitled to recover.

In accordance with these views I have modified the instructions for the jury respectively asked for by counsel in the cause, and embodied them as follows:

I. If the plaintiffs were the entire, unconditional, and sole owners of the property insured, for their own benefit, and had undisputed possession of it at the date of the policy, then the fact

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Statement of the case.

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that the record-title was in another person does not defeat their right to recover in this action, unless they concealed the condition of the record-title from the defendant company and its agents, and misled them by a contrary statement in their application for insurance, or unless they sought to deceive and mislead them in regard to the record-title and ownership at the time of the fire by false swearing in their proof of loss.

II. The execution of a mortgage by the plaintiffs, after taking out the policy of insurance, did not defeat their right to recover in this action, *unless* the mortgage, by reason of their insolvency or otherwise, wrought such a change in their ownership or interest in the property that their loss at any time before the fire would have been, or at the time of the fire was, less than the full value of the property destroyed.

The jury after a short absence brought in a verdict for the plaintiffs, with damages at \$1750 and interest.

*Judge Meredith and Mr. John A. Coke represented the plaintiffs.*

*Messrs. W. W. Henry, P. W. McKinney, and J. P. Fitzgerald represented the defendant company.*

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*United States Circuit Court, Eastern District of Virginia, at Norfolk, November 14th, 1878.*

MARY J. WININDGER AND CHILDREN v. THE GLOBE MUTUAL  
LIFE INSURANCE COMPANY OF NEW YORK. .

The failure to pay an instalment of premium of insurance in advance when due, causes a lapse of the policy, unless the agent of the company by indulgence creates the belief in the insurer that he is treating the instalment as if it had been actually paid.

THE case was brought first in the Corporation Court of Norfolk, and was removed thence into the United States Circuit Court. The plaintiff was represented in the trial by Messrs. White and Garnett; the defendant by Messrs. Baker and Walke.

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Statement of the case.

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The facts as given in evidence were, substantially, that although the policy called for the prepayment each year of annual premiums, yet that these were changed subsequently into quarterly instalments, payable at the beginning of each quarter-year, on what are called renewal receipts, the effect of which was to extend the policy for each three months on payment of the quarterly payment in advance.

The payment by Winindger of these quarterly instalments of the premiums had been very irregularly made, rarely before near the end of each quarter instead of the beginning.

These payments had been made partly in butcher's meat and partly in small amounts of cash to Mr. E. J. Griffith, the insurance agent of the defendant in this city.

Mr. Griffith had been exceedingly indulgent to Winindger in respect to the forfeiture of the policy, keeping it alive by dealings, by accepting small sums at a time, and by taking due-bills for balances.

The instalment due the 10th October was probably never paid, but Winindger relied upon Mr. Griffith's keeping his policy alive as usual, probably thinking his butcher's account had partly paid the quarter's premium, and that a sum of eight dollars in money sent by his clerk would be credited to the premium.

At all events, Winindger was confident throughout his last illness that his policy was alive, and this as late as the first day of January, which was two or three days before his death.

Nevertheless, on or about that day he sent out his brother with the money to pay the October instalment.

His brother called on Mr. Griffith at once and offered to pay the instalment, but Mr. Griffith stated that he had returned to the insurance company in New York the renewal receipts for the October instalment, and could not now receive the money, especially inasmuch as Winindger was now seriously ill, and that the policy was forfeited.

On this state of facts, given in evidence to the jury, counsel on each side asked the court for instructions to the jury covering their respective views of the law, and submitted learned arguments in support of them.

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Opinion of the court.

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HUGHES, J. declined to give any of these instructions in the form in which they were asked for. He said :

A policy of insurance could only be kept alive in general by the payment in advance, at the beginning of each year insured for, of the annual premium. That the payment in advance of the premium was an essential element of an insurance contract. That on a failure to make this payment at the beginning of any year, the policy lapsed by its very terms. That the policy now sued upon provided that it might be renewed after default, if the premium should be paid within thirty days after the beginning of each year. But it must be borne in mind that the policy lapsed at the beginning of the new year, after default, and that payment within thirty days but *renewed* what had expired. The agreement in this case to accept quarterly instalments only changed the times and amounts of the payments, not the nature of the transaction. If the annual payment was not made by the beginning of each new year the policy lapsed. The payment in advance of a quarterly instalment of this premium only operated to revive and renew for the ensuing three months what had lapsed and expired. If, therefore, any quarterly payment was shown not to have been made, then the policy had not been revived, had not been renewed, and there could be no recovery.

The judge then instructed the jury as follows :

“ There are two questions upon which the jury are to pass in this trial, namely : first, whether the premium due the 10th October, 1877, was paid ; and if it was not paid ; second, whether Winindger's neglect and failure to pay it before his mortal illness was caused by the defendant, or its agent, Mr. Griffith, inducing him to believe that he might neglect to do so to the extent that he actually did neglect it, without losing the benefit of his policy. The court accordingly gives the following instructions :

1st. “ If the jury believe, from the evidence, that Winindger did not pay the October quarterly instalment of the premium, then they must find for the defendant ; unless,

2d. “ They believe, from the evidence, that Winindger's neglect to pay it was induced by the conduct of the defendant, or Mr.

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Syllabus.

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Griffith ; and if they believe that his failure to pay was so induced, they must find for the plaintiff.

3d. "The court also instructs the jury that a tender of a past-due premium for or by the insured during his mortal illness, does not of itself save a policy otherwise forfeited."

The jury then retired to their room, and after a deliberation of about twenty minutes brought in the following verdict :

"We the jury find for the plaintiffs, and assess their damages at \$2000, with interest thereupon at six per cent. from April 13th, 1878."

Mr. Walke entered a motion to set aside the verdict as contrary to the law and the evidence, and both counsel agreed to submit the motion to the court without argument. The court accordingly took the motion under advisement.

On a later day in the term the verdict was set aside, and a new trial ordered. The case was afterwards compromised.

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*United States Circuit Court, Western District of Virginia, at Danville, March 20th, 1878.*

METROPOLITAN LIFE INSURANCE COMPANY v. GEORGE W. HARPER, TRUSTEE, ETC.

Where the amount of a policy of life insurance has been paid by the insurer, and he afterwards brings suit to recover it back, he must be deemed by the payment to have settled and waived all questions of law and fact, as to the validity of the original contract, except fraud, which they had the means of raising when they paid the loss.

A foreign insurance company may sue as plaintiff in a United States court, regardless of any State law forbidding such foreign companies from resorting to United States courts.

IN chancery.

The material facts of the case appear in the opinion of the judge, delivered as follows, by

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Opinion of the court.

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RIVES, J.—This is a suit in chancery, brought for the amount of a life policy paid the defendant under the allegation of a fraudulent procurement thereof. The jurisdiction, therefore, of the court arises out of this alleged fraud. The application and medical examination of the insured took place on the 8th day of July, the policy issued on the 2d August, and the death occurred on the 18th October, all in the same year, 1875. The proofs of death were taken in the succeeding November. They bear on their face the marks of due care and just precaution. They consist of the statements of the claimant, the attending physician, the undertaker, and the company's resident agent. They display a searching scrutiny into all the facts affecting the liability of the complainant under its contract of insurance. The death was sudden. There had been no such complaint, or known disease beforehand, as would have led to the apprehension of such an instantaneous seizure and death. It was, therefore, well suited to challenge the attention and arouse the suspicions of the company. Could such a sudden death occur without some organic disease, or constitutional infirmity, concealed in violation of that stipulation of the policy, denouncing it null and void, "should any of the statements or declarations made in the application, on the faith of which this policy is issued, be found untrue as regards the age, health, habits, or family history of the insured?" The period of ninety days after due notice and satisfactory proof of death, is reserved to the company for a consideration of the question of its liability under the various warranties it exacts of the insured, of the absolute verity of his answers to their interrogatories. These questions are so numerous and cover such a variety of topics, and in some instances, of such apparent remoteness to the risk, that untrue answers, however immaterial or mistaken, must often be found in practice to furnish a loophole of escape to the insurer. Still the normal requirements of good faith and truth must prevail; and it is not for the insured, or the court that has to pass upon his contract, to shelter him under the plea of the immateriality of the falsehood. He has chosen to contract on the basis of the truth of his answers to all questions; and he has no right to discriminate between them as to their relative weight with his co-contractor.

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Opinion of the court.

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It is scarcely to be supposed that this company was idle in this interval, and failed to make diligent inquiry into all facts touching the payment of the policy. Had they chosen to be thus derelict, it is but just that they should be bound by the consequences of their negligence. But, in my opinion, they are not subject to such an imputation. Look to the questions, with which they ply their resident agent, D. H. Pannill, and his answers. He is asked to state all the facts and circumstances within his knowledge relating to the cause of death. His answer is: "I know nothing of the facts and circumstances attending this death, of my own knowledge. I heard that he died suddenly in Danville, some said of apoplexy, some of heart disease." Again, in answer to the seventh question, as to his knowledge, information, or belief, of any facts inconsistent with the statements made in the application of the insured, he concludes his answer with this significant disclaimer: "I know of no fact why the insured should not have been regarded as insurable at the time he was insured, and have heard of nothing since, but quite the contrary from all who knew him." This information was given the company by their responsible resident agent under the date of the 16th November, 1875. Should they not have taken alarm at his report of "death from heart disease?" Did not the inquiry naturally arise whether such disease did not antedate the application, and if so, its existence be a breach of its warranties? It is hard to suppose that the four months intervening between these proofs, and the payment of the policy on the 29th March, 1876, passed unimproved by the company in a searching inquiry into all the breaches that are now marshalled in imposing array in the argument of this cause. Is there no legal effect to be attributed to this payment, under these circumstances of delay, and opportunity of inquiry? Notwithstanding this acknowledgment and ratification of the contract, is the case still open in equity for all the defences which the company could have made to an action at law by the defendant to recover of them the amount of this policy? I think not. Reason and authority alike declare that after this payment they are precluded from setting up the warranties, of which they might have availed in their resistance of this payment. The time has passed for such defences. Whether

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by design or neglect they have allowed the time to pass within which they could have opened up and relied upon such defences. They have virtually waived them, and are now remitted to the sole defence of fraud. To this effect is the case cited by Mr. Bouldin, of the *National Life Insurance Company v. Minch*, 53 New York Reports, 144. It was an action brought to recover of the defendant as administrator, etc., of Anna C. Minch, \$2500 and interest as damages suffered by the plaintiff by reason of a conspiracy and fraudulent representations, whereby the plaintiff was induced to insure the life of the deceased and to pay the loss after death. It is precisely like the case at bar with this exception, that it was a case at law and triable before a jury; whereas the present is in equity, and to be tried by the chancellor without a jury. The doctrine was there clearly and distinctly announced that a breach of any warranty in an application for a policy of life insurance, must be insisted upon by the insurer, when a claim is made for the execution of the contract, or it will be deemed to have been waived. Mere ignorance of a fact which would have enabled a company to defend on account of such breach is not such mistake of fact as will enable it to recover back money paid upon the policy. In the opinion of the court in this case, this pertinent and comprehensive remark of Judge Sutherland in 27 Barb. 354, is quoted and approved: "In this action they must be deemed by the payment to have settled or waived all questions of law or fact, as to the validity of the original contract, except fraud, which they had the means of raising when they paid the loss."

The doctrine thus clearly stated and commended by its reasonableness to our approval seems to me conclusive of many points raised and discussed by plaintiff's counsel. Such, for instance, is the objection to the appointment and disqualification of the medical examiner. It seems that regularly he is appointed by the general agent, who reports him to the company for confirmation, where I suppose he is duly registered. Whether this is the case where there is a new field for the introduction of this insurance business I am not informed; at any rate the act of the local agent in the appointment becomes known to the company on the issue of the policy, and any irregularity or impropriety therein

is the act of the agent, and necessarily waived by the grant of the policy. On this occasion the agent enters on his canvass under the auspices of a resident attorney of the county, to whom the agency was transferred. The insured was a man of respectability and influence; and it was an object with these canvassers to secure him as a patron of their business; accordingly, a friend and neighbor is warmly solicited to aid them in prevailing on the decedent to take a policy in their company. He does so. Under such circumstances of importunity the agent would scarcely agree to be balked in his scheme by the want of a disinterested physician; on the contrary it would not have been surprising if he had improvised a *medecin malgre lui* (a doctor in spite of himself) out of the materials nearest him rather than lose the prize he was in the act of clutching. Nor would it have mattered in law or reason, because his act or fraud would have to go before the company and be repudiated in the rejection, or ratified in the issue of the policy. So, the time for this objection has passed; and whatever irregularity or impropriety there may have been in this selection of the medical examiner, and his conduct of the examination, the company is estopped from availing of it at this time by their accepting the action of their agent in the premises. It is proven that Dr. Robertson did not wish to act; pleaded urgent professional calls upon him at the time, and that the insured also suggested to Dr. Smead, the agent, the impropriety of his acting, as he was a brother-in-law of his, but none of these considerations diverted Dr. Smead from the consummation of the proposals while his recruit was yet in the humor for the contract. Now would it not be a great injustice under these circumstances to allow the company to disavow the knowledge or plead ignorance of these facts; and after the execution of the contract by the issue of the policy to rake up from the past objections that were merged in that policy and obliterated by its grant? I cannot escape the conclusion that it would be.

In the same way, and for the same reason, it is not permissible for the plaintiff's counsel to range through the whole network of interrogatories and rely upon breaches unaffected by fraud. To constitute such fraud, the falsity of the answer is not sufficient of itself; it must be combined with the guilty knowledge of its

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falsity. Take for instance the answer to the eighteenth question, which has been arraigned by the concluding counsel of the plaintiff as the rankest fraud in the case; the assertion, namely, of the medical examiner that the life proposed was in all respects a first-class healthy risk. This is an opinion still avowed by Dr. Robertson, and I am at a loss to conceive how they should predicate of it, much less prove a knowledge on his part to the contrary, and a fraudulent concealment thereof. So with the answers to questions seven and eight, the truth of which is still averred by Dr. Robertson; and we have no testimony to the contrary at the time of insurance. So far as the testimony discloses, the rheumatic symptoms may have supervened upon the insurance; at the time of the medical report no ailment was spoken of save catarrhal and neuralgic affections; so that fraud cannot fairly be imputed to these answers. And, further, I take it that counsel for the plaintiff have fully conceded that they are restricted to allegations of fraud and cannot now rely on bare breaches of warranty, which were settled, adjusted, and closed forever by the voluntary payment of the loss, though the company were ignorant of the existence of the breaches at the time of such payment. In the same line of argument, much stress is laid on the discharge of the insured from the confederate army at Norfolk, in 1863, some twelve years prior to the insurance; and although a witness attributes that discharge as well to incompetency as a colonel of militia as to low spirits and enfeebled health. But Dr. Robertson declares that that discharge was not on any grounds affecting longevity, but rather from apprehension of what disease might be developed by the life and exposure of the camp; and it is not just to predicate of his silence on that head, a fraudulent concealment on his part in the absence of all proof that his apprehension of consumption was ever fulfilled by the event, and his positive assertion that the insured was not consumptive.

The bill in this case is framed upon the idea that the plaintiffs would be restricted to the question of fraud. It does not contemplate or ask for relief on the score of breaches of warranty, free from such taint. I admit there is a general sweeping averment of fraud, but it is virtually narrowed to three special instances, which are confined to the answers to three questions,

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namely : Nos. 10, 11 and 12, and are said to consist in the fraudulent assertion : 1, " That William H. Harper had never had any illness or injury ; 2, That he had never consulted any physician concerning himself ; and 3, That he did not use alcoholic stimulants or malt liquors to any daily extent." To these specific charges the pleadings and proofs conform ; not so, however, with the argument, which, as I have shown, has taken a wider range.

I must now turn my attention to this aspect of the case. First, however, we must ascertain the current of authorities by which I must steer my course to a decision in this cause. One class is where the applicant, by himself or another, prepares his declaration and solicits his policy. There the courts decide that he is bound by his answers and warrants their truth, so that it is not for him nor the court nor the jury to rely on their immateriality ; they are stipulated for as a basis of the contract ; the insurer had a right to call for them ; and it is for him alone to determine the weight to be given them in his decision upon the grant or refusal of the policy. Nothing but truth in such answers can subserve the ends of morals or law, and uphold the bona fides and justify the execution of the contract. No question here arises as to the obligation of the warranties, for they are not challenged by any testimony dehors the written instrument affecting its purport or validity. Such are the cases of *Jeffries v. Life Insurance Company*, 22 Wallace, 47, and *Ætna Life Insurance Company v. France*, 1 Otto, 510.

But a different rule is applied to the case of local agents who are engaged in the business of soliciting insurance. Where they are active and the insured passive ; where they prepare the declarations and dictate the answers, and the respondent accepts them, the courts have refused to enforce against the insured the leading canon of evidence, namely, that a written instrument cannot be varied by parole testimony. But upon the ground that the insurer has, by the act of his agent, secured an advantage which operates as a fraud upon the insured, the latter will be allowed to prove the part of the agent in the framing of his answer, though it tends to invalidate the authenticity of the instrument. This is done under the doctrine of estoppels in pais ; a doctrine, as Justice Miller observes, well established and understood, but

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its applicability not so well defined as could be wished. It has, however, been applied to insurance in numerous well-considered judgments by the courts of this country. Otherwise, the officiousness of insurance agents would defeat the ends of justice and often tend to the support of dishonest claims. To this class belong the cases of *Insurance Company v. Wilkinson*, 13 Wallace, 222; *Insurance Company v. Mahone*, 21 Wallace, 152; *Continental Insurance Company v. Kasey*, 25 Gratt. 268; *Manhattan Fire Insurance Company v. Weill & Ullman*, in *Virginia Law Journal* for May, 1877, p. 290.

Being thus furnished with the law and the discriminations made by it, we advance to the facts of this case. It is not my purpose to enter on a critical examination of the voluminous proofs in this cause. I shall indicate my conclusions rather than endeavor to support them by particular references to the testimony. The pleadings in this cause must be given their just weight. This forum allows the complainant to appeal to the conscience of the defendants, and when he has done so, the answers can only be overruled by two witnesses, or one witness with corroborating facts. What, then, briefly is the statement of Dr. Robertson's answer? That he was arrested in the midst of urgent professional calls by Dr. Smead, the agent of the plaintiff, and constrained by his importunity to undertake a task entirely new to him, that of a medical examiner of his brother-in-law, William H. Harper; that he had not time to read the paper or printed forms presented to him, but was directed in his task by the agent, to whom he readily yielded as to one authorized by the company to guide him in filling up the blanks in the printed form. "When in this way he reached question No. 10, respondent stopped, and was going on to mention the illness and injuries which the said W. H. Harper had had, without objection on the part of W. H. Harper, when said Smead said that that question must be answered 'No,' unless such illness or injury had impaired said Harper's constitution or general health; and respondent believing it had not, and believing also that said Smead knew how the said question should be answered so as to meet the requirements of his company, wrote the answer 'No.' When question No. 11 was reached, namely, 'Has the said life ever consulted any phy-

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sician concerning himself?' respondent asked said Smead if he must answer whether he consulted him, or whether he had consulted any other physician besides himself, and said Smead replied that he must answer whether he had ever consulted any physician besides himself, and that he must answer said question 'No.' When question No. 12 was reached, namely, 'To what daily extent does the said life proposed use alcoholic stimulants or malt liquors?' respondent answered, 'Not at all,' and he claims now that answer was true."

Now if this answer could be disproved there is one only living witness who could do so, and that is Dr. Smead. His deposition has been taken and filed by the plaintiff in this cause. I have read it attentively, and can find nothing substantial to contradict or discredit the answer. There are some trivial and circumstantial discrepancies, but a substantial agreement. Dr. Robertson is arraigned for not excluding Smead from the examination, and for not reading the caption of the paper; while Dr. Smead, acting at different times both as agent and medical examiner, pleads as his excuse for his forbidden presence, that he also had not read the caption and was ignorant of its prohibition. This disposition, then, is to be taken as sustaining the answer. Not a suspicion, therefore, is left as to the part of Dr. Smead in dictating the simple answer of "no" to the questions Nos. 10 and 11, and suppressing the explanatory remarks of Dr. Robertson as assented to by W. H. Harper. Can the company, therefore, take advantage of this answer dictated by their agent, and exclude the explanation made by Dr. Robertson? Certainly not, if the decisions of the Supreme Court that I have cited are to be respected and obeyed. But, say the plaintiff's counsel, give the defendant the benefit of Dr. Robertson's explanations, which were suppressed by Dr. Smead, and still there is a fraudulent concealment of the real state of the insured life. He is confronted by the fact of Harper's discharge from the confederate army and his spell of sickness in February, 1875. This, of course, depends on the testimony, and the plaintiff assumes the onus of showing the former was due to a consumptive habit, and the latter to a serious organic derangement. It is easy enough with a suspicious turn of mind to conceive and charge such was the case; but with

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the court it is a question of proof. There has been a diligent search for testimony on this subject ; a large number of witnesses have been examined upon it ; no pains have been spared to establish it, if it existed ; and yet after a careful sifting of the testimony it seems to me there is a plain defect of proof to maintain the issue on the part of the plaintiff. The sum of the testimony is that the discharge from the army was owing to low spirits and depressed health as well as military incapacity ; and that the spell of sickness in the winter arose from a temporary derangement of the stomach, from both of which the insured recovered before the insurance in July, 1875. If these indispositions were more serious, I can only say the fact has not been shown to my satisfaction. No one of all these witnesses has been found to testify that the insured was consumptive, or that his health was impaired by organic disease. It is true that he was sick for some eight or ten days in February preceding his demise, but where is the proof that it was otherwise than as described by his physician ; a transient affection of the stomach, from which he recovered without any lasting injury. All this diagnosis may be wrong, but where is the proof of it ? Parties in interest and third persons may speculate to the contrary, as interest or suspicion may suggest ; but the judgment of the court must repose on a surer foundation. It requires proof, and is forbidden to enter the field of conjecture, where fraud is never presumed, but is always to be proved.

The same reasoning applies to the habits of the insured as to drink. No witness deposes that he ever saw him drunk or under the influence of liquor. Prior to his sickness he drank ardent spirits occasionally at home and abroad, but no one can be gotten to declare that the habit affected his health or constitution, or that he ever carried it to excess. His indulgences in this way might be exaggerated or lightened, according to the fancy of the witness ; but I infer from the general current of testimony he had been a moderate drinker, and had not in this respect abused or impaired his health or constitution. But after February, 1875, it is indisputably proven that he abjured ardent spirits and addicted himself to the occasional use of wine only. Under this state of proof was Dr. Robertson justified in answering question No. 12 : " To what daily extent does the insured use alcoholic stimulants,"

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“Not at all?” I think he was, and I discern in that answer no concealment whatsoever, much less a fraudulent concealment. Thus, then, stands the case with the defendant Dr. Robertson. The insured only acquiesced in these answers, and must be, at least, as free of fraud as he. Both these men stand fair and irreproachable in their communities. I see nothing in this testimony to blast their characters and convict them of fraud.

There is no ground to fear that these insurance companies will fail of the protection of the courts and be left exposed by them to the machinations of the fraudulent. They are praiseworthy and beneficent enterprises and will, I doubt not, receive the full protection of the law in all cases of fraud. This is proven by the sequel of the case of Anna C. Minch, which I have quoted. The new trial resulted in the finding of the atrocious fraud alleged, and the recovery of the amount of the policy already paid, with interest and costs. Such, I am sure, would be my judgment in such a case. But it is solely because the fraud is not proved to my satisfaction that I feel constrained to deny the relief asked. Had it appeared to me that W. H. Harper had by himself, or in conspiracy with Dr. Robertson, fraudulently violated any of the warranties on which his policy rested, no such consideration of sympathy as has been hinted would, for a moment, withhold me from the retribution which it would be in my power and will to visit upon such a breach of faith. I am not able to fasten on the deceased the fraud alleged against him. He seems to me to have been the passive recipient of the policy he was solicited to take; and his tacit acceptance of the answers which Dr. Robertson gave for him, under the direction of the agent, are not tainted by falsehood or fraud. Nor does it seem to me that the company have any right to complain that either their agent or medical examiner betrayed their confidence or exceeded their authority. The whole transaction was as fair and honest as the infirmity of human nature admits of. An interested and jealous mind may doubtless discern flaws and lapses in it; but a generous and just construction of motives and acts will, it seems to me, exculpate the parties from the serious charges against them.

In casting around for the cause of this controversy, I can

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scarcely be mistaken in attributing it to the sudden and remarkable death of the insured. It was well calculated to provoke hostile speculations, and to impugn the accuracy or good faith of the medical report. In contemplating such a catastrophe, so instantaneous and unaccountable, rumors might well spread that it was due to heart disease, or some organic derangement which Dr. Robertson should have seen in its beginning and reported on his examination. Hence, medical experts have been examined as to this death, and have failed to detect or expose its immediate cause. All of certainty we have on the subject is the theory of his physician that it was the transfer of his neuralgic rheumatism to his heart. At any rate there is an entire absence of proof to show it was owing to a cause existing at the time of the medical examination, was then known to Dr. Robertson, and fraudulently suppressed by him. In Mrs. Minch's case, she was represented to have died of pneumonia, when it was proven she died of cancer, fraudulently concealed in her declaration. How unlike to this case!

I have not adverted to the testimony of Dr. Hegeman, the vice-president of this company. It is so largely devoted to the offer and rejection of compromises, all of which is inadmissible as evidence, that it has no special weight in this case. So far as it seeks to impeach the evidence of Dr. Robertson through his conversations and letter exhibited with the deposition, I see nothing that may not be reconciled, and consist with the truth of both witnesses.

After a careful and deliberate consideration of the case, I am satisfied it was right to set aside the issue once directed in it. It is emphatically a case of equitable jurisdiction, where the verdict of a jury could scarcely aid the court. Where the credibility of conflicting witnesses is to be passed upon, it is perhaps proper to evoke the verdict of a jury; but in all other cases resting upon the original jurisdiction of a court of equity, it is rarely discreet to devolve the responsibility of a judgment, in whole or in part, upon the finding of a jury.

It has been suggested that as this company has contracted, under the terms of the act of Assembly, to be amenable to suits in the courts of this State, it forfeits its character of a foreign cor-

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poration and its right to sue in this court. This consequence does not seem to me legitimate. It may be bound to appear through its resident agent to suits against it; and when brought its agent may be precluded from removing the case to a Federal court, as, I am told, has been decided by our Court of Appeals. But evidently this act does not pretend to deprive the foreign corporation of its resort, as plaintiff, to this court. Hence, I decline to yield to the claim of the defendant's counsel that I have not jurisdiction of this case.

I have thus hurriedly disposed of the questions raised and discussed in this case with rare ability. It only remains for me to announce my judgment that the bill must be dismissed with costs, and the injunction against the bankers dissolved, so that they may pay the deposits to the defendant, George W. Harper.

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*United States District Court for the Eastern District of Virginia,  
at Richmond, 2d August, 1877.*

COHN, ASSIGNEE, *v.* THE VIRGINIA FIRE AND MARINE  
INSURANCE COMPANY.

If a husband, who has insured for himself without mention of his wife's ownership, sues for damages by fire to his wife's estate claiming an insurable interest, his declaration must set out his interest, and claim damages to that interest, or he cannot recover.

ON motion for new trial.

HUGHES, J.—Oscar Newman insured his wife's separate property as his own, held in his own right. The suit is by his assignee in bankruptcy. The policy describes, and the declaration demands the full value of, the property as "*his* stock of groceries and liquors," "*his* store fixtures," and "*his* household furniture, wearing-apparel, pictures, and books." Nothing whatever is said in the policy, nothing in the declaration, of his

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*interest in* that property contingent upon the death of his wife and children, or of the interest he had as husband *in the use* of the property named. He did not insure the right of user which he had in the property. That right of using was an insurable interest, but it was not insured by description, and it must have been specifically insured by description to entitle him to recover damage from the loss of it, in the event of the destruction of the property by fire; just as the insurance of a ship does not *per se* insure the cargo and freight.

And even after insuring the specific interest by name (if that had been done), the declaration should have demanded his loss from the destruction of that specific *right to use*, to entitle the insured to recover. You cannot recover the loss of a cargo under a policy which merely insures the ship, or under a declaration which only demands damages from the loss of the ship.

It is clear in this case that the jury found that Newman's loss was from his loss of the *right to use* the property; and as that right was not insured by the policy, nor demanded by the declaration, the verdict was against the law and the evidence, and must be set aside. An order will be made to that effect, without prejudice to the plaintiff's right to amend his declaration if he should think proper.

If there had been positive proof of the existence of property in Newman's place of business belonging to himself, and not embraced in the wife's separate property; and if at the trial the existence of such property had been shown in the evidence, and relied upon in the argument, there would have been some basis for the verdict of the jury. But as it is clear to me that the verdict was not founded upon such a fact or claim, for that reason also the verdict should be set aside.

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*United States Circuit Court for the Eastern District of Virginia,  
at Richmond, February 18th, 1879.*

YOUNG v. JONES, BROS. & Co.

The exclusive right to use the trademark of a firm does not pass to any member of the firm by mere implication; but such member may use it, provided he do so in a manner not to deceive the public.

INJUNCTION against use of a trademark.

HUGHES, J.—A bill was filed by the plaintiff on the 15th of January last, complaining of a violation of his trademark by the defendants, and making a case for a temporary restraining order under section 718 of the Revised Statutes; and the order was given, to stand until the 12th instant. A rule was given against the complainant, returnable on the 12th instant, which is now heard. The defendant files his answer and affidavits. The complainant files affidavits, and the case is heard on the defendants' motion to dissolve the temporary restraining order, and on the complainant's motion for a preliminary injunction until the cause shall be finally heard on plenary proofs.

Smith, Snyder & Co. was a firm which established a valuable European reputation for a certain manufacture of sumac and bark, and their brand became valuable as a trademark. They were succeeded by the firm of Jones, Snyder & Young, which acquired an exclusive right to their trademark or brand, "Smith, Snyder & Co." The firm of Jones, Snyder & Young was composed in part of the firm of Jones, Bros. & Co., which was engaged in another business. This latter firm became insolvent, and went into bankruptcy. Previously to doing so, and in contemplation thereof, and by consent of all parties concerned, this firm of Jones, Bros. & Co. sold to N. J. Young, senior member of the firm of Jones, Snyder & Young, "all their right, title, interest, property, claim, and demand in or to the assets of the firm of Jones, Snyder & Young, as set forth in an itemized schedule" annexed to the assignment. This schedule contained a list of property and shipments of the firm, and did not enumerate either

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the goodwill or trademark, either of the firm of Jones, Snyder & Young, or of the original firm of Smith, Snyder & Co.

The question in this case is, whether the name and business of the firm was an asset of Jones, Snyder & Young.

The interests of trademark and goodwill are omitted from express mention in this or any oral contract which accompanied the assignment to Young of the effects of Jones, Snyder & Co.

It is well-settled law that upon the dissolution of a partnership each partner has a right, in the absence of stipulation to the contrary, to use the name and style of the partnership in any way consistent with the facts of their business which does not have the effect of deceiving the public. He may say successor to the late firm, and may make like representations. In the absence of express stipulations each partner may use the goodwill of the former partnership. It is also held that rights in the trademark are analogous to rights in the goodwill of a partnership. In the absence of express stipulation at the time of dissolution, each partner may go on and use the trademark of the firm. This right does not pass inferentially under a general assignment; but is like a man's skill in any kind of pursuit, it remains with him. See for this principle *Banks v. Gibson*, 11 Jurist (N. S.), 680. It has been a matter of some debate and contrariety of decision by the courts, whether one surviving partner after the death of the other succeeds to the goodwill of the firm; the better opinion now being that he does not. *Hammond v. Douglass*, 5 Vesey, 539. Even where the goodwill of a prosperous business of eight years' duration has been sold by its proprietor along with the lease of the premises, and all the stock, wagons, and fixtures used in the business, which consisted of "Howe's bakery," it was held in a leading case that the vendee had not the right to use the name "*Howe*" of the vendor, that not having been expressly mentioned in the contract of sale. *Howe v. Searling*, 10 Abb. Pr. R. 264; Collyer on Partnership, last edition, 236; 2 Kent's Commentaries, 372, in notes.

On the want of right in the complainant, and not on the title to the trademark of the defendants, the injunction must be dissolved.

*United States District Court, Western District of Virginia, at  
Abingdon, December 13th, 1877.*

IN RE EDWARD M. CAMPBELL, BANKRUPT. EX PARTE ELLEN  
S. CAMPBELL, AND EX PARTE T. P. TRIGG, ASSIGNEE.

An assignee in bankruptcy filed a petition asking a reference to the register, with instructions to take an account of liens binding upon the bankrupt's real estate, and of their priorities, and to summon lien creditors to show cause against a sale of the real estate free of incumbrances.

Pending that petition in court, in term, and in consequence of it, the bankrupt's wife preferred her petition in court, praying a settlement out of a certain parcel of the bankrupt's real estate.

By the same order of court which granted the prayer of the assignee's petition the wife's claim for a settlement was also referred to the register, with instructions to take evidence and to make report in regard to it, as well as in regard to liens and their priorities.

Six weeks after this order of reference, to wit, on the 8th of December, 1877, the assignee and all lien creditors having been summoned before the register and been present before him, and being still before him, the register made up his report as to the liens, and as to the wife's claim for a settlement.

On the 12th of December, 1877, the register presented his report in court, in term, the assignee and lien creditors being present in person or by counsel; and the assignee then filed exceptions to the report, these exceptions relating only to that part of the register's report which treated of the bankrupt's wife's claim for a settlement.

On this state of facts, it was, on sundry exceptions,

*Held*, That although the wife could not have been required to submit her claim to the judgment of the bankruptcy court in the summary bankruptcy proceeding, yet that it was competent for her to waive her right to an adjudication on plenary proceedings, and to submit voluntarily to the adjudication of the bankruptcy court.

*Held*, That in the summary bankruptcy proceeding it was sufficient that the assignee and lien creditors had had opportunity to produce evidence and make argument before the register against the wife's claim for a settlement, and to file exceptions to the register's report; and that they had had a day in court to object to the report of the register; and that, therefore, they had no right to insist that the wife, against her wish, should be driven to a plenary proceeding in another court.

*Held*, That clause *third* of section 4972, Revised Statutes of the United States, gave full jurisdiction to the bankruptcy court over the subject-matter of a wife's "specific claim" to a settlement out of the bankrupt's estate; and that her coming voluntarily into the bankruptcy court, by petition, to assert that claim, gave the bankruptcy court jurisdiction, personally as to herself, to "*ascertain and liquidate*" that claim.

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*Held*, That where a wife's separate estate has been changed from one form of investment to another by agreement between herself and her husband, and, before the title in the property newly acquired had been made to her, the husband becomes bankrupt, the bankruptcy court, as a court of equity, in a case where its jurisdiction is clear, will treat that as done which ought to have been done, and decree a settlement upon the wife of property acquired with her separate means.

ON the 15th of September, 1877, the assignee in this cause filed his petition, describing in detail certain various tracts of real estate belonging to the bankrupt; among others a one-acre lot of ground near Abingdon, containing a large brick house, the dwelling of the bankrupt and his family, valued at eight thousand dollars. It set forth also that he had already advertised another valuable tract of land, or farm, belonging to the estate, to be sold in connection with other contiguous parcels belonging to other persons, which other tracts had been advertised for sale at the same time with this one; and it prayed leave of the court to go on and make instant sale of this farm.

It set forth the fact that various judgment liens existed which bound all the real estate of the bankrupt; prayed for process to bring these lien creditors in, to assert their liens and show cause why the lands of the estate should not be sold free from them; and, in the event that no cause should be shown to the contrary, it prayed that a sale might be made of the lands free from incumbrances. The petition was partially considered on the first day of the then ensuing fall term of the court, and the prayer for leave to make immediate sale of the farm was denied, on the ground that lien creditors had not had a day in court, nor opportunity to show cause against the sale; and that no account of the liens (and their priorities) binding upon the real estate had been taken and reported to the court.

On the same day, or early in the term of the court, Ellen S. Campbell, the wife of the bankrupt, filed her petition, asserting a claim upon the acre lot and dwelling-house which has been mentioned, the principal recitals and prayers of which are as follows:

She set out that her husband had surrendered sundry parcels of real estate, consisting of a farm, house and lot, in Abingdon, and

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other property in the county of Washington, of the value of about twenty-three thousand dollars, and personal property and choses in action of the estimated value of some twenty-nine thousand dollars. Among the real estate surrendered is the house and lot where she and her husband and family now live, valued at nine thousand dollars. She would represent that she is the daughter of James L. White, whose estate was a valuable one. Some seven thousand dollars of the property which she inherited from her father's estate has been sold, and the proceeds applied in the main, to the extent of about six thousand dollars, to the building of this house where she now lives; and which, as before stated, has been surrendered by her husband in bankruptcy. It was always understood that this property was to be conveyed to her, inasmuch as her own means to a large extent was expended in the building of the house, as before stated, but that has not been done. No regular conveyance, as she is informed, has yet been made of that property to her husband, but he is the equitable owner of said property. She is now forty-two years of age, and is the mother of eight children, who are now living. The youngest of these children is two years old, and the eldest is about nineteen. The only property of which she is now the owner in her own right is about three shares in the stock of the Holston Salt and Plaster Company, at Saltville, valued at some two hundred and ninety dollars; sixty-eight shares in the stock of the Lead Mines Company, in Wythe County, of the nominal value of twenty dollars per share, and which ordinarily yields to her per annum the sum of one hundred and twelve dollars; and an interest in the Goose Creek Salt Works, in Kentucky, worth some one hundred and fifty or two hundred dollars. Her husband having surrendered all his property in bankruptcy, this is the only means left her, of her father's estate, for the support of herself and family, except the amount which her husband may be able to make by his profession.

Inasmuch as her means, to the extent of at least six thousand dollars, has been expended in building the house aforementioned, with the understanding aforementioned, she is advised that she is entitled to an equitable settlement out of the estate surrendered by her husband in bankruptcy. She would represent that she is also entitled to her contingent right of dower in the real estate surrendered by her husband, who is now fifty-two years of age. Whilst she is aware that she can *claim* nothing upon this score now, but if any allowance is made her it must be done with the consent of her husband's creditors—yet she is willing to relinquish her claim to dower, if proper compensation is given her by the said creditors; and she believes it will be to her interest, and to the interest of her husband's creditors, that such arrangement should be made, by the assignee, as will relieve the real estate of her husband of her contingent right of dower.

To the end that both these objects may be accomplished, she asks that your honor will make an order requiring and directing the assignee of her husband to file a petition convening all the lien creditors of her husband, and those who are not lien creditors, who have

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proved their debts, and herself, so that the first question may be settled and passed upon by your honor, and so that such an arrangement may be made with the creditors upon the second question as will enable the assignee to sell the real estate of her husband free from her claim of dower; and she resorts therefor to your honor's court. She asks that no sale be made of the house and lot where she now lives until these questions are settled; that the assignee be directed to offer the other real estate for sale in both ways, *i. e.*, subject to her contingent right of dower, and free from her contingent right of dower; and report both sales to your honor's court, so that it may be seen what difference there will be in the sales, and thus both herself and the creditors will be better prepared to know what she really ought to have for her contingent right. And your petitioner prays that such relief may be extended to her as the nature of her case may require, and as in duty bound, etc.

It also appeared in the proofs that the legal title in the home property was still outstanding in the person from whom it had been purchased before the dwelling-house was erected; and it had been so held for the purpose, at some convenient time, of its being conveyed to the use of Mrs. Campbell; a purpose, however, which had been delayed by the intervention of the liens of judgments recovered against the husband, the bankrupt.

On these two petitions, expressly named in its order, the court, on the 31st of October, 1877, referred all matters therein recited to the register, with directions to proceed according to law, to notify the lienors of said bankrupt of his taking an account of liens and their priorities, so that an order for the sale of the real estate of said bankrupt might be made free of incumbrance; and directing the register "to report said liens and their priorities, including therein the claim of Mrs. Ellen S. Campbell, for an equitable settlement out of the estate of her husband, presented by her in her petition." The decree directed him "to make his report to the court, if practicable, before the adjourned term thereof, to be held at Abingdon on the 10th of December, 1877." The register was orally instructed by the judge in open court to give *personal notice* of his taking the account of liens, and of his inquiry into all matters referred to him, to all lien creditors, and to the assignee; and it is not denied that he did give such personal notice.

Under this order, most of the lien creditors, if not all of them,

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being present in court by counsel when it was made, the register afterwards proceeded to take the account of liens, after giving personal notice to all lien creditors and to Mrs. Campbell, and to take evidence on Mrs. Campbell's claim. Having concluded his examination, he made up his report on the 8th of December, in his office, and filed it in open court on the 12th of December, 1877, during the adjourned term, which was held from the 10th to the 14th days of that month. As to Mrs. Campbell's claim, he said as follows in his report :

In regard to the claim of Ellen S. Campbell, I submit her proposition (petition), marked E. S. C., for an equitable settlement out of the estate of her husband, E. M. Campbell, and to which no exceptions have been taken, *and therefore report that it be allowed.* From the deposition of E. M. Campbell and others filed in this cause, I find that about six thousand dollars of the means of Mrs. E. S. Campbell, derived from her father's estate, were expended in the erection of the house where she now lives.

The register added the words in italic, at the suggestion of the judge, after his report was presented in court, in order to make it responsive to the order of reference. There was no exception to the register's report as to other matters. As to Mrs. Campbell's claim, the following exceptions were filed in court on the day after filing of the register's report.

T. P. Trigg, assignee of said bankrupt, excepts to the report of John W. Stallard, register, filed the eighth day of December, 1877, and for cause of exception assigns the following, viz. :

1. Because the register has not made a report in accordance to the decree. Instead of reporting whether Mrs. Ellen S. Campbell is entitled to an equity of settlement, he merely refers the court to her petition claiming such settlement. He makes no report at all as to the amount she is entitled to by way of such settlement.

2. The said report cannot be acted on at this time ; because the same was not filed in time to give the assignee and creditors an opportunity to examine the same and except thereto before the same came up for confirmation ; the claim being filed on the 8th of December, 1877, with the register, and the affidavits in support of said claim being taken on that day, without notice, and the report concluded on the 10th.

3. Because there was no process issued or opportunity given to the assignee or the unsecured creditors to answer the petition of Mrs. Ellen S. Campbell for an equity of settlement.

4. Because the creditors whose claims are unsecured, who have

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proven their debts, were never notified to show cause against the allowance of the claim of Mrs. Ellen S. Campbell for an equity of settlement.

5. Because the said report is based solely upon testimony that is illegal and improper in this cause. The only testimony being that of E. M. Campbell, who is the husband of the claimant of the equity of settlement; and of other parties who derived their information by hearsay of the said husband. It was not competent for the register to base any report upon such evidence. In no case can the husband or wife be a witness for or against each other. 1 Green, 334, etc.

6. Because the statements in the petition, even though proved, would not be sufficient to entitle the claimants to an equity of settlement. The wife's equity attaches only when resort must be, or is actually had to a court of equity to reduce her property *into her husband's possession*, or complete his title thereto. In the case at bar the title of the husband was complete, and he had actually converted the property of the wife, and appropriated the same; thus her right to an equity of settlement is gone. See *Poindexter and Wife v. Jeffries and others*, 15 Gratt. 363; 1 Minor, 307-8.

7. Because there is no property out of which the claimant can claim a settlement; and even if there was, there is no proof in the case, nor is there anything in the record or the report to show the amount of the property out of which she might make such a claim; or that her condition or that of her husband is such as to induce the court to make a settlement. The allegations of her petition or claim cannot be taken as true, because there was no process upon the same or opportunity given the assignee or creditors to answer or deny it.

No objection was made to any part of the register's report, except that part relating to Mrs. Campbell's claim, and the exceptions of the assignee thereto.

*Messrs. White & Buchanan and Daniel Trigg for the assignee.*

1. As to proper mode of procedure, see *Stickney v. Wilt*, 11 N. B. R. 97; 23 Wallace, 150; *Smith v. Mason, assignee*, 6 N. B. R. 1; 14 Wallace, 419.

2. As to evidence offered:

*First.* Husband's testimony inadmissible in favor of wife. Revised Statutes of United States, sec. 858, page 162; Code of Virginia, 1873, ch. 172, sec. 22, page 1110; *Saunders v. Ferrill*, 1 Ired. Law N. C. 97; United States Digest, vol. vii, p. 277.

*Second.* Testimony of third parties as to statements made by

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husband inadmissible. *Saunders v. Ferrill*, 1 Ired. Law N. C. 97; *Lewis v. Caperton*, 8 Grattan, 148.

3. On the merits: 1 Minor's Institutes, 1st ed. 325; *Poin-dexter and Wife v. Jeffries et als.*, 15 Grattan, 363; *Cronie v. Hart*, 18 Grattan, 739; 1 White & Tudor L. C., vol. i, part 2d, 4th Am. ed. 672; *Pool v. Morris*, 29 Ga. 374; *Taggart v. Boldin*, 10 Md. 104; *Gross v. Reddig*, 45 Penn. St. 406; *Lyne v. Bank of Kentucky*, 5 J. J. Marshall, 545; *Hatch v. Gray*, 21 Iowa, 29; *Lewis v. Caperton*, 8 Grattan, 148.

*Messrs. Gilmore and Penn, for Mrs. Campbell.*

The statements of petition must be regarded as true, no answer denying them having been put in by any one. The assignee had full knowledge of the petition of Mrs. E. S. Campbell. The order directing the register to report upon the claim of Mrs. Campbell, among other incumbrances, was in pursuance of assignee's petition theretofore filed. See decree of September 11th, 1877, and October 31st, 1877.

The statements of the petition are substantially confirmed by the depositions of Dr. Campbell, the bankrupt, John Kreger, and James Fields.

In the notes on *Dyer v. Dyer*, 1 Lead. Cases in Eq., part 1st, p. 282, 4th Am. ed., it is said that a resulting trust arises where a purchase is made by a husband with the proceeds of the wife's separate estate, or with money bequeathed to her, whether the deed is made in his own name or in that of a third person. *The Methodist Church v. Jaques*, 1 Johns. Ch. 450; 3 Id. 77; *Dickenson v. Codwise*, 1 Sandf. Ch. 214; *Pinney v. Fellows*, 15 Verm. 525.

Where money of wife, not reduced to possession by husband, has been invested in land and *title taken by husband*, there is a resulting trust good against creditors. 2 Story's Eq. Jurisp., 12th ed., sec. 1201, n. 2, p. 443; *Click v. Click*, 1 Heisk. (Tenn.) 607.

In this case no conveyance has ever been made to Dr. Campbell. The wife's funds, therefore, will be regarded in a court of equity as never having been reduced to *possession* by husband. Its character has only been changed from one piece of property

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to another, and will be regarded as now only *in transitu*. And whenever this is the case, and the court can lay hold of the property, it will do so, and will not permit the creditor of the husband to take it, unless upon condition that a fair, equitable settlement be made upon the wife and children. Notes to *Murray v. Lord Elebank*, 1 L. Cas. Eq., p. 634, etc. The statements of petition in this case, together with the depositions taken and filed, show that Dr. Campbell not only did not reduce the property of his wife to possession; but also that he refused to have the deed to the same made to himself.

So, where the money of wife *had been reduced to possession by husband*, and the husband had only taken a bond for title, and had come to equity to get title. *Mallory v. Mallory*, 5 Bush. (Ky.) 464.

If the conveyance in this case had been made to Dr. Campbell, then it might be necessary to show that there was an agreement between Dr. Campbell and his wife that the property purchased by him with her funds should be held by him for her, or should be conveyed to her. But see opinion of Chief Justice Williams in *Mallory v. Mallory*, *supra*, p. 466, and *Sims v. Spalding*, 2 Duvall (Ky.), 121. It is submitted that such proof has been offered as would be necessary to fasten a trust upon him, to the amount of the money of his wife so expended, even if the conveyance had been made to him.

In such a case as this, the declaration of the husband to show the purpose for which the payments were made, may be given in evidence. 1 L. Cas. Eq., p. 642, etc.; 2 Story's Eq., sec. 1201.

HUGHES, J.—1. As to the *first* exception of the assignee, it is true that, when first presented to the court, the register's report recommended nothing as to Mrs. Campbell's claim; but, on the judge's suggestion that the register should recommend either the allowance or disallowance of the claim, the words recommending the allowance were inserted by the register in court. This amendment removes the technical objection; and the first exception, which is only a technical one, is overruled.

2. The *second* exception is also overruled. The claim of Mrs. Campbell was set forth in full, and preferred by her in her peti-

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tion presented in open court, at the October Term. It was one of the matters expressly referred to the register, by the order of the 31st October, 1877, made on the petition of the assignee. In pursuance of that order the creditors were convened by the register, to show cause against the claim and against a sale free of incumbrances, some time before he made up his report. They accepted legal service of his summons to appear before him. After a full hearing by him and full opportunity given to all for objecting to his report, it was made up on the 8th December, while the lien creditors were still before him, and with their full knowledge. With the knowledge of them all, he filed the report in open court on the 12th ; and the assignee filed his exceptions to it on that day ; and all have now been fully heard by the court in opposition to its allowance. The matter was before the register from the 31st of October until the 12th of December ; and the creditors had the greater part of that time to put in their evidence, and file their arguments and objections against the allowance claimed by Mrs. Campbell. They also had a day and did make full argument against it in court.

The bankruptcy proceeding is essentially a summary one. The action of the bankruptcy court, in regard to the real estate of this bankrupt, and to the liens and claims upon it, was invoked by the assignee himself. The proceeding taken on his motion, though necessarily summary in form, has been with full opportunity given for all parties in interest to be fully heard ; and it is not competent for the assignee to object that he has failed to avail himself of the opportunities afforded him on his own motion for making good his case.

3. The *third* objection is overruled. It was on the petition of the assignee that the reference to the register was made, and that the lien creditors and all persons having claims upon the real estate were convened. It was in consequence of such petition of the assignee to sell clear of all incumbrances, that Mrs. Campbell presented her claim by petition, and that it was referred, along with other claims, to the register. The assignee had full notice of this claim by the proceedings in court ; and as to the proceedings before the register, it was he, virtually, who was summoning and convening incumbrancers, and not they him.

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It was his duty to appear before the register without summons ; and, in point of fact, he was there diligently, both in person and by counsel. It does not lie in his mouth, therefore, to say that he was not summoned before the register during his action upon a reference which the assignee himself had procured.

4. The *fourth* objection is overruled. The general creditors are represented, in all matters in bankruptcy, by the assignee. They are generally so numerous that it is not practicable to convene them for any purpose except to vote in the election of an assignee, and on the subject of dividends. It is not the policy of the bankruptcy law to convene them on other questions. It gives them no power to act on other questions. This assignee was in fact present before the register, and represented all general creditors. The action of the assignee in now resisting the allowance is the action of the creditors. They could do no more than he is doing for them ; and the objection, that they have not been convened each in person, is not well taken. He is, in all respects, their agent, attorney, and representative by statutory appointment.

5. The *fifth* exception is overruled. In bankruptcy proceedings the bankrupt may be at any time examined by the register and by the court. As to all matters concerning his estate, he is a competent witness, and no objection can lie to his testimony, save to its credibility. See section 5086 Revised Statutes of United States, and section 8 of the amended Bankruptcy Act of June, 1874, and Bump, section 5086 a. So also may the wife of a bankrupt be examined in bankruptcy. See sections 5087 and 5088. And, generally, in the courts of the United States, "no witness shall be excluded in any civil action because he is a party to or interested in the issue tried." Section 858, p. 162.

6. The question raised by the *sixth* exception is one of more serious moment. The facts of the case seem to have been misapprehended by the exceptant. There has been no consummated conversion here, by the husband, of the wife's separate estate as exceptant claims ; and the case of *Poindexter v. Jeffries*, 15 Gratt. 363, and those like it, do not apply. There has been in this case a change of investment, from some other form, into the form of a dwelling-house near Abingdon ; but the title of that property has not yet been made to the separate use of the wife according to the

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agreement or understanding between herself and husband. Whoever, therefore, holds the legal title, holds it for the uses of whatever purpose the husband and wife had agreed that it should be devoted to. The legal title outstands in a third person subject to the decree of a competent court. The assignee cannot get the legal title without coming into a competent court and obtaining a decree for its conveyance to him; and such court will then decree according to the equity of the case. This court is competent under the third clause of section 4972 to adjudicate specific claims upon the bankrupt's estate.

It is a general proposition that, in equity, where the conversion of the wife's property from one form into another has been attempted or consummated, the court will consider that as having been done which should have been done. I had occasion to examine the law of this subject very elaborately in the bankruptcy case of *G. W. Anderson*, 9 N. B. R. 360, 2 Hughes, 392, where a great number of authorities on the subject were reviewed, some of which are referred to in the briefs of counsel in this cause. That was the case in which, through the fraud of one Robert Gibbony, there had been an actual conversion, by the husband, of the wife's real estate to his own name and possession by legal deeds; and it was decreed that he was to be treated as a trustee for his wife, and that his lands did not pass to his assignee by the assignment in bankruptcy, and were not bound by the liens of his judgment creditors. In the present case the conversion has been only partially effected; and the court may, with greater propriety, direct that that shall be done which ought to have been done; the more, because it had been agreed by the husband and wife that the investment in the dwelling-house should be for her own benefit.

The disposition of courts in recent years has been to go very far, and to reach out very diligently and searchingly, to preserve a wife's inheritance to her separate use. It is only where fraud appears that this policy has not been pursued; or where the rights of *bona fide* purchasers, without notice, have intervened between the conversion and the settlement. And the courts invariably hold, in this last class of cases, that the purchase must be actual, and not merely constructive; that the purchase-money must have actually been paid before notice; the giving of a bond on

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time or the entering into a contract for the future payment of money not being sufficient. See 2 White & Tudor's L. C. in Equity, 62; 2 Atk. 241; 3 Atk. 304-804. And in this connection the courts hold that a judgment creditor is not a purchaser. 2 White & Tudor's L. C. in Equity, 92, and cases there cited; and same, pages 101 and 102.

7. The *seventh* exception is not well taken, in alleging that there is, in this case, no property out of which the wife can claim a settlement; for the allegation is that the dwelling-house property is the result of the expenditure of her separate estate. That is, of course, therefore, the property out of which her settlement must be made if made at all.

As to the objection that the allegation of Mrs. Campbell's petition cannot be taken as true, because process was not served, nor opportunity given to the assignee or creditors to answer, that objection has already been considered in connection with exceptions *two* and *three*. In the summary proceeding, the exception takes the place of the answer, and the reference offers full opportunity for counter-testimony. The sworn petition of Mrs. Campbell, supported by the sworn testimony of the bankrupt and of the witnesses Kreger and Fields, taken by the register, with full opportunity of cross-examination afforded to the assignee and to the creditors, all of whom had been summoned before the register, constitute the proof on which the register based his report. It is sufficient proof in form and substance to justify a decree. If the assignee and lien creditors failed, in the period of six weeks, to make answer to the petition, and to adduce testimony in refutation of the allegations of the petition and of the testimony of the bankrupt and other witnesses, the court has a right to presume that no counter-testimony was available, and that no denial by answer could be made to the allegations of the petition. These allegations are themselves sufficient, if true, to warrant the court in decreeing a settlement; at least to the extent of requiring that the separate means of the wife, which have been expended upon the dwelling-house property by the husband, under the circumstances set forth in the wife's petition, shall not be diverted to the payment of the husband's debts.

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On the merits, I think there can be no difficulty in this case. The only question admitting of doubt is, whether it was competent for the wife to come into the bankruptcy proceeding for the adjudication of the matters set forth in her petition ; and whether it is competent for the District Court, on its bankruptcy side, in the summary bankruptcy proceeding, to adjudicate her rights on the petition, on the reference to the register and on the exceptions of the assignee to the register's report.

It is well settled that the assignee could not, by his petition, have brought the wife and the person holding the legal title in the dwelling-house, into the bankruptcy court against their will ; nor required them, without their consent, to submit to a summary adjudication of the wife's rights by that court. The case of *Smith v. Mason*, 6 N. B. Rep. 1, 14 Wallace, 419, settles that point ; and the case of *Hume v. Scruggs*, 4 Otto, 22, somewhat similar in its facts to the present one, shows that a plenary proceeding is the proper one to be employed where the interests of third parties are to be affected. But if third parties who are incidentally connected with the estate and assets in bankruptcy, are proceeded against summarily by the assignee, and choose to come in voluntarily, thereby waiving the rights which they have under the ruling in *Smith v. Mason*, then we have the authority of *Stickney v. Wilt*, 11 N. B. Rep. 97, 23 Wallace, 150, for holding that such consent of theirs gives jurisdiction to the court in bankruptcy. Just as clearly may such parties (as Mrs. Campbell, for instance, in this case) come in by their own petition, and ask an adjudication of their rights. Here the assignee himself invoked the authority of the court to take the summary proceeding before the register and to sell real estate free of incumbrances. Spurred to action by this petition of the assignee for authority to sell the property in which she claimed a settlement free of incumbrances, the wife of the bankrupt, in favor of whose equitable right to a settlement out of one parcel of the bankrupt's real estate a legal title outstands, comes voluntarily in, by petition, and prays that that right may be adjudicated by this court. The case of *Stickney v. Wilt* affords authority for the court to proceed in the summary manner when invoked by the assignee, and concurred in by the bankrupt's wife.

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The court referred both petitions, by the same order, to the register, and all parties have had the period of six weeks to make good their cases by testimony; they have had a hearing, after personal notice, before the register; and they now have a day in court for final argument and all proper motions.

The interlocutory petition and rule *nisi* are the principal instruments of pleading in the summary proceeding, and correspond with the bill and answer in the plenary one, which they substitute. As to general creditors in bankruptcy, even the petition and rule are unnecessary. See *In re Judkins*, 2 Hughes, 404.

On the pleadings and proceedings, therefore, as well as on the merits, I feel warranted in overruling the *seventh* exception and making a decree in the case. I do so in view of section 4972 of the Revised Statutes of the United States, which extends the jurisdiction of the bankruptcy courts of the United States, amongst other things, to "the ascertainment and liquidation of the liens and *other specific claims*" on the assets of the bankrupt. Having, under this section, full jurisdiction over the subject-matter of the claim, the authority of the bankruptcy court was defective only in respect to such persons as are but incidentally connected with the bankrupt's estate. The case of *Stickney v. Wilt* removes any difficulty which the court might have on that score, by deciding that, where such persons come voluntarily into the bankruptcy court, as Mrs. Campbell has done here, that court may bind them by its decrees. The *seventh* exception of the assignee is therefore overruled.

Decree entered directing the assignee to pay to Mrs. Campbell the sum of six thousand dollars out of the proceeds of said house and lot, and that the stocks, etc., set forth in her petition be set apart to her sole and separate use in lieu of her contingent right of dower.

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*In the Circuit Court of the United States, for the District of Maryland.*

JOHNSON v. ONION ET AL.

When a patent would expire on the 15th May, and the application for an extension of it was filed on the 15th February preceding, held that the application was within ninety days, as required by law, and valid, the day of the filing being included.

The validity of Conover's patent for a movable bed or carriage for carrying, advancing, and splitting blocks of wood, affirmed.

IN equity.

The case is sufficiently developed in the opinion of

GILES, J.—The bill is filed in this cause for an injunction and an account, etc. It sets forth that on the 15th May, 1855, Jacob A. Conover, a citizen of the United States, obtained letters patent of the United States, granting to him for the term of fourteen years the full and exclusive right of making, etc., the invention and improvement set forth and described in the specifications annexed to said patent, and that by assignments duly executed and recorded, all the rights under said patent in and for the State of Maryland have become vested in the complainant, and that he has full authority to sue for and recover for all infringements thereof in the State.

That the said patent has been sustained as a valid patent in several suits in New York; one, a suit at law for damages brought by the patentee against one John H. Rapp, in which Conover recovered a verdict, and in which suit it was determined that Conover was the first and original inventor of the improved wood-splitting machine described in said patent. That said patentee subsequently obtained an injunction against John R. Dohrman and John H. Peipho, to restrain them from infringing said patent. And by the supplemental bill, it appears that since the filing of the original bill in this cause the term of fourteen years for which the said patent was granted has expired;

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and that the commissioner of patents, upon due application made, and a hearing before him, granted an extension of said patent for seven years; and that since the said extension the said patentee has duly assigned to complainant the same rights which he, complainant, held under the original patent in and for this State.

The answer sets up several defences :

1st. They deny that Conover was the first and original inventor of the machine described in his patent.

2d. That the verdict of *Conover v. Rapp* was a collusive one; that the principal question discussed by Judge Shipman, in the case against Dohrman & Peipho was the question of infringement; and they also, to show that Conover was not the first and original inventor of the machine described in his patent, gave notice of several patents previously granted, which they will rely on in the trial of this case.

During this litigation, as I have before stated, the patent expired and the extension was granted; and in the answer of the defendants to the amended and supplemental bill, the defence set up is that the extension of the said patent is void, as the application for the same was not filed ninety days before the expiration of the said patent.

Now, the first question that presents itself in the consideration of this cause is, was the extension of the patent by the commissioner legally granted? or, in other words, was the application for the extension filed "at least ninety days before the expiration of the patent?" Upon this question I have had no difficulty. The patent expired on the last hour of the 15th May, 1869, and the application for the extension was filed on the 15th February, 1869. The day on which the application is filed is included, and you have therefore ninety days before the expiration of the patent.

In support of the propriety of counting the day upon which the application is filed in the calculation of the ninety days, I refer to the cases of *Griffith and others v. Bogerts et al.*, 18 Howard, 163; *Sheets v. Selden's Lessee*, 2 Wallace, 190; *The State v. Smierle*, 5 Richardson, 299; *Thomas v. Afflick*, 16 Penna. St. Rep. 14; *Childs v. Smith*, 13 B. Monroe, 461.

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In the case in 18 Howard, 165, the Supreme Court say,

Where the construction of the language is doubtful, courts will always prefer that which will confirm rather than destroy any *bona fide* transaction or title.

It is clear to me, therefore, that this application for extension of the letters was in time, under the act of 1861, sec. 12.

The next question is, what is the true construction of Conover's patent?

He makes three claims; they are all for combinations.

He does not claim, as new, any of the constituent elements of his combinations. His first claim is in these words:

What I claim as my invention, and desire to secure by letters patent, is the movable bed or carriage for carrying and advancing the blocks of wood in combination with the reciprocating cutters operating at right angles with the surface of the bed or carriage, substantially as and for the purpose specified.

Now the counsel for the defendants contend that the movable bed or carriage, named in said claim, can only mean a movable bed with flanges on the side, as described in said patent. It is true that Judge Hall, in his able charge to the jury in the case of *Conover v. Roach and others*, held that it meant a movable bed or carriage as described in patentee's specifications—that is, having flanges on its side to keep the wood firm and in place.

Judge Ingersoll does not touch this question in his decision in the case of *Conover v. Rapp*, and in that case there does not appear to have been any argument made upon the flanges at all.

Judge Shipman is very clear in his construction of the patent in the case against *Dorhman & Peipho*. He says:

The construction and operation of the machine described in the patent are substantially as follows: a bed or carriage composed of sections, linked together in the form of an endless chain, which is made to travel over a table and around drivers or wheels placed at each end. Blocks of wood of required length of material for fuel are placed upright on this bed. Over the bed, at the point where the block is to receive the blow which splits it, is a cutter, made in the form of a cross, so that the block may be split into small sticks instead of slabs or boards, as would be the case if the cutter was composed of only one straight blade. The bed, with the block thereon, is put in motion by an intermittent feed, and the block ad-

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Opinion of the court.

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vanced under the cutter at every throw of the feed mechanism, measured by the range at which the feed mechanism is set. The cutter firmly fastened above to a stock, as the block passes under it, works up and down with a reciprocating motion, splitting the block as it descends, and then raising from it so that it may be carried by the bed a step forward, when it descends and splits again. As the blades of the cutter rise they are cleared of any pieces of wood that may be clinging to them, by a clearing plate fixed above, and into which the cutter plays freely as it rises or falls through apertures or mortices in the plate. When the machine is in motion the bed not only carries the blocks to the point where they are split by the cutters, but it also carries off the wood after it is split.

It must be seen that he says nothing about flanges.

I incline to the construction which claims a movable bed, with or without flanges. While in his specifications the patentee describes his movable bed with flanges, yet he assigns to them no specific function. Other parts have their functions assigned, but these flanges have not. No doubt the bed is better with the flanges, and that may be his preferred mode of making it, but it is no part of his patent. Had it been intended by him to make the flanges a part of his patent he would have referred to them and made them a part of his claims. But he makes no mention of the flanges in his several claims at the close of his specifications, his claim being only "for the movable bed or carriage for *carrying and advancing the block of wood* in combination," etc.

But the wood is held under the knives by the clearing plate as described in the patent. I should therefore think that if the wood could be split without the flanges, and I see no reason why it could not, the flanges were not essential parts of the Conover patent, although they would no doubt be an improvement on it. I admit this is a doubtful point, but it makes no difficulty in this case, because I hold that the machine used by the defendants is an infringement of the plaintiff's patent even in this particular.

In this case the machine used by the defendants, represented in the model J. H. J., No. 6, clearly infringes the Conover patent. Never was there a clearer case of infringement. Here is the movable bed or carriage, substantially the same as that described in the patent, the reciprocating cutters operating at right angles with the surface of the bed or carriage substantially as described in the patent, and these devices operate substantially

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in the same way as described in the patent. In the machines of the defendants, as it is alleged they are now used, the outside slab or bar of wood has been removed, and a V knife is used instead of a knife cruciform in shape, but in my opinion the machine so modified would have in substance the same means of supporting the blocks laterally, as the machine described in the patent, for the slab or inner bar of wood, next to the frame, affords the effective lateral support to the block of wood at the moment when such support is most needed.

The proof, however, shows that the outer side or slab of wood was upon the machines when this bill was filed, but I hold that, with or without the sides, it is a clear infringement to use such a machine. Nor is it necessary to resort to the doctrine of equivalents in this case, for the matter is too clear for dispute. See *Winans v. Denmead*, 15 Howard, 342.

It is maintained also by the counsel for the defendants that George Page invented and made a machine which antedates the Conover patent.

He also examined all the testimony relating to the Shaw model, and said that all of it merely showed the making of a model, and not of any practical working machine, which was necessary to overthrow a patent.

He therefore held that the complainant was entitled to a perpetual injunction, notwithstanding the suggestion of the counsel for defendants, that his right to an injunction had been lost by the laches of the complainant. The court held that there was no such laches or abandonment as would justify a court of equity in withholding an injunction, and referred for authority to 1 Story, 282.

The court then passed a decree directing a perpetual injunction to issue against the defendants, and referring the case to the master in chancery to state accounts, reserving his decision as to the precise mode of adjusting them for a future order of the court, and decreed the costs to be paid by the defendants.

*Wm. Pinkney Whyte, Chas. M. Keller, R. Mason, for complainants.*

*I. Nevett Steele, J. H. B. Latrobe, for defendants.*

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Opinion of the court.

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*United States District Court, Eastern District of Virginia,  
April 3d, 1878.*

## IN RE CHARLES T. BINFORD.

Where a sale of goods is made on condition that the title of the vendor is not to pass until the purchase-money shall be paid, and the goods are delivered to the vendee:

*Held*, That such a stipulation is valid; and, if all taint of fraud is disproved, a subsale of the goods by the vendee, before payment in full to the vendor, will not affect the title of the original vendor.

The possession of goods does not of itself carry along with it the property in them, nor of itself identify the real owner of them.

In Virginia the possession of the fixtures and outfit of a tobacco manufactory does not create the presumption that the title to them is in the person using them.

The decision of the District Court affirming the above principles, reversed by the Circuit Court on appeal, on the ground that the original vendor had lost his rights by laches.

ON exceptions of John J. Binford to the register's report of the liens and their priorities binding upon the bankrupt's estate.

The facts of the case appear in the opinion of the judge of the District Court, which was as follows:

HUGHES, J.—This is a contention between John J. Binford, of Richmond, and Dohan, Carroll & Co., of New York, as to which shall be paid in full their claim against John H. Greanor out of the proceeds of the sale of certain property of the bankrupt.

I think the facts of the case are as follows: It seems that certain tobacco-manufacturing fixtures and property were sold by Cook & Laughton, auctioneers, at auction, in Richmond, on March 11th, 1873. They were paid for by John J. Binford in cash; the whole price of the goods purchased amounting to five thousand two hundred and thirty-nine dollars and sixty-four cents. In making up that sum, Binford used a note of John H. Greanor for one thousand three hundred and sixty dollars, given him by Greanor for the purpose. Binford had this note dis-

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Opinion of the court.

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counted on his own credit, as a means of making up the amount of cash purchase-money due for the goods.

There was immediately afterwards another transaction in respect to this specific property. Greanor and his son-in-law, Charles T. Binford (who was the son of John J. Binford), were tobacco manufacturers. I believe the evidence shows that at that time Charles T. Binford was in the employment of Greanor. At all events, it is very plain that John J. Binford's purchase of the property in question was made as a means of aiding his son Charles in business. These being the social relations subsisting between the three men, John J. Binford and John H. Greanor, immediately after Binford's purchase of the property, made an agreement with each other that Greanor should take charge of the property, and use it for the purpose of carrying on the business of a tobacco manufacturer; that he should pay John J. Binford for the property the price which it had cost at auction; and that John J. Binford should continue to be the owner of the property until Greanor should complete, by payments made from time to time, the reimbursement to Binford of the purchase-money. Greanor was to pay as rent for the property a rate equal to eight per cent. of the amount due to Binford. This understanding may have been had, and probably was had, before the time of the auction sale. At all events, Greanor, who understood what ought to be the value of the several articles sold, did the bidding at the sale; Binford, not being a tobacco manufacturer, not himself making the bids. The account of the auctioneers was made out against Binford; and the purchase-money was paid by him.

Greanor thereupon went into the business of manufacturing tobacco, using the outfit which had thus been supplied by John J. Binford. I will here remark that it is quite customary in Richmond, and other Virginia cities and towns, for tobacco fixtures and other property used in the tobacco manufacture to be used by manufacturers who are not themselves owners of such outfits; and that the possession of such property by manufacturers does not and is not taken to imply ownership; and that the using of such property by persons not owning it does not raise a presumption of fraudulent intent. As appears in this case,

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these outfits are quite costly ; and it is not for the interest of trade, and it is not the policy of the law, to require the ownership of such property to attend the possession, and to identify the real owner.

Greanor went on with the business of manufacturing tobacco in Richmond, with the use of this property, from March, 1873, to February 11th, 1876. During that interval of time he made payments to John J. Binford, at different dates down to November 20th, 1875, of such sums as left the balance then due at the amount of one thousand five hundred and fifty-eight dollars and seventy-two cents. No bill of sale or writing had ever passed from Binford to Greanor in regard to this transaction ; no paper of any sort was put on public record ; and now the amount due to Binford is about one thousand seven hundred and thirty-one dollars and thirty-one cents.

On the 11th of February, 1876, Greanor, having occasion to settle an old debt due to, and to borrow additional money from, the firm of Dohan, Carroll & Co., of New York, made a deed of trust, by which he conveyed the property which had been procured for him by Binford as has been described, and some other property in his tobacco factory, to a trustee in trust to secure the payment of fifty-five hundred dollars to the New York firm. No mention was made at the time to Dohan, Carroll & Co. of the title of John J. Binford ; and no mention of this deed was made to John J. Binford, who remained ignorant of its existence until the following April. On the 15th of April, 1876, Greanor made a sale and deed of assignment, by which he conveyed to his son-in-law, Charles T. Binford, all the property which he had previously transferred by deed of trust for the benefit of Dohan, Carroll & Co. The consideration of this transfer to Charles T. Binford was the latter's undertaking to pay off debts of Greanor to the amount of eight thousand eight hundred and five dollars and thirteen cents, as shown by a schedule attached to the deed of assignment, in which schedule it appears that five thousand dollars was then due to Dohan, Carroll & Co., and one thousand five hundred dollars due to John J. Binford. Greanor's deed of assignment to Charles T. Binford made mention of the deed of trust which had been executed in February preceding for

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the benefit of Dohan, Carroll & Co.; and of the fact that the claim of John J. Binford was "secured by title retained to nearly the whole of said property except the engine and boiler;" that is to say, the property used by Greanor in his tobacco factory, and embraced in the terms of the deed of trust.

After this assignment, Charles T. Binford went on with the business of manufacturing tobacco until his bankruptcy, which occurred on the 8th November, 1877. At an early stage of the bankruptcy, the property which is the subject-matter in which the present contention originated was sold by consent, under an order of this court, and the proceeds of sale not being sufficient to pay off in full the two claims of John J. Binford, and of Dohan, Carroll & Co., the question now to be determined is, which is entitled first to be paid? it appearing from the register's report that one thousand seven hundred and thirty-one dollars and thirty-one cents is the amount due to Binford; and four thousand four hundred and seventy-three dollars and ninety-six cents the amount due to Dohan, Carroll & Co.; while the fund applicable to these two claims only amounts to five thousand three hundred and eighty-three dollars and two cents.

The real question is as to the title and ownership of the property on the 11th February, 1876, when Greanor made his deed of trust in favor of Dohan, Carroll & Co. Was it Greanor's property, and had he power to make title to it in prejudice of the right of John J. Binford to be paid what was due him under the agreement which had been made between himself and Greanor in March, 1873? I can see no taint of fraud in the transaction of March, 1873. Indeed the character of the parties is such as to forbid the surmise of any intentional fraud. The transaction was a natural one, growing spontaneously out of their personal relations to each other. There is no feature in it which suggests the imputation that it was intended to delay, defraud, or hinder creditors in their rights. From motives of affection which do him honor, Mr. Binford had bought the property constituting the outfit of a tobacco manufactory, and paid for it. He had bought it, not for his own use, tobacco manufacturing not being his business, but for Greanor, with whom his son was associated in that business. Both Greanor and his son were without capital,

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and probably without credit ; a thing not unusual with tobacco manufacturers, whose trade is subject to great vicissitudes. He therefore gave Greanor the use of this outfit for his business, in a manner to show that he did not desire to make profit on his transaction ; but only sought, while putting Greanor on his feet in business, to incur no loss by his act. The requirements of *Davis v. Turner*, 4 Grattan, 422, and of *Curd v. Miller*, 7 Grattan, 187, are fully satisfied by the evidence taken in the case.

I see nothing illegal in the contract or agreement which J. J. Binford made with Greanor. The property was his by purchase. It was competent for him to lend or hire it to Greanor. It was competent for him (and not unusual in like cases in Virginia) to hire Greanor this outfit for manufacturing tobacco, upon the terms which were in fact agreed between them. By that agreement the title to the property was not to pass from Binford to Greanor until Greanor should have fully paid for it. And, if it was competent for the two men to stipulate that until the whole purchase-price was paid the title should remain in Binford, then the title remained in Binford until the last cent was paid.

The authorities are conclusive on the right of a vendor to stipulate for a retention of title, after surrender of possession, until the performance of conditions agreed upon as precedent to the passing of the title. (The last I have observed is that of *Fosdick v. Schall*, 8 Otto.)

The first case I know of in which this principle was laid down was that of *Mires v. Soleboy*, 2 Modern Reports, 243. There the title had been reserved after the delivery of a flock of sheep until the vendee should at a certain day pay the purchase-price. The vendor made a second sale before payment, and the sale was held to be good against the first vendee. That was a stronger case for the defendant than the one at the bar, because it was the person in Binford's place whose sale was held to be valid, and not the person in Greanor's place.

Benjamin, in his work on Sales, treating of sales of personal property, says :

SECTION 320. *Third rule.*—To these may be added, where the buyer is by the contract bound to do anything as a condition either precedent or concurrent, on which the passing of the property de-

## Opinion of the court.

property will not pass until the condition be fulfilled, even goods have been actually delivered into the possession of

ere is a condition precedent attached to a contract of sale, the property does not vest in the purchaser on delivery, performs the condition or the seller waives it, and the uses in the vendor even *against creditors and subsequent vendee*. 2 Kent's Commentaries, 497, 12th edition, numerous cases there cited; 27 Missouri, 45; 7 Blatchford Pickering, 512; 2 Hill (New York), 326; 4 Hill (New York), 552; 114 Massachusetts, 376; 3 T. & J. (New York), 380, 644.

ese goods are sold at a fixed price, to be paid on a certain delivery is made upon an agreement, *express* or *implied*, until the price is paid *the title is to remain* in the vendor, a condition precedent, and, until performance, the property is retained in the purchaser. 7 Gray, 155, 158; 4 Vermont, 48; 8 Gray, 158; 18 Vermont, 182; 9 New Hampshire, 298; 15 Gray, 225; 24 Vermont, 55; 12 New Hampshire, 4 Cushing, 195; 22 Vermont, 203; 11 New Hampshire, 121; 45 Vermont, 118; 12 Iredell (North Carolina), 149-150; 38 Vermont, 448; 103 Massachusetts, 376; 8 Vermont, 151.

agreement is valid, though the goods were not in existence at the time, they may become a subject of bargain and sale when the agreement is performed, when delivered, they were delivered under the agreement. 114 Massachusetts, 376. The vendor in such cases may retain the goods, where the price has not been paid, even from one who has purchased them or *taken a mortgage* of them from this vendee *with and without notice*. 98 Massachusetts, 149; 3 Gray, 314; 114 Massachusetts, 376; 5 Gray, 306; 45 Massachusetts, 499; 109 Massachusetts, 376; 8 Gray, 241; 79 Pennsylvania, 38; 15 Kansas, 600; 49 Maine, 219; 46 Illinois, 319; 46 Vermont, 48; 45 Vermont, 4, 18, 118, 122.

It does not aid the purchasers in such cases, because their purchase conveys no title to the property, could convey none. Such purchasers hold the same legal condition as do *bona fide* purchasers for value. 8 Gray, 159, 160.

In Connecticut, where, as throughout New England, the law has been most diligently studied, in the case of *Forbes v. Williams*, 384, Williams, C. J., used the following language:

In all cases the vendee comes into possession of property *known* to belong to another man. Whether, therefore, he has borrowed it, or hired it, or purchased it, becomes a question of fact, and ought to be ascertained by him who proposes

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to trust his property upon the faith of this appearance; for the law offers its protecting shield to those who attempt to protect themselves. Accordingly, we find that *all these cases of conditional sales*, made *bona fide*, have been held good against attaching creditors, as well as between the parties. In the cases above cited from New York and Massachusetts, *Strong v. Taylor*, 2 Hill, 326; *Hussey v. Thornton*, 4 Mass. 405; and *Barrett v. Pritchard*, 2 Pick. 512, the claim was made by creditors. So, too, in the cases of *Vincent v. Cornell*, 13 Pick. 294; *Fairbank v. Phelps*, 22 Pick. 535; and *Patten v. Smith*, 5 Conn. 201, the same principle was recognized, though the cases may have been determined on other points.

Nor is the law thus laid down contrary to good morals or public policy.

I conclude, therefore, on the strength of these authorities, that the title in the property which Binford purchased on the 11th of March, 1873, and then delivered to Greanor, was still in Binford when Greanor made his deed in favor of Dohan, Carroll & Co., on the 11th of February, 1876.

And the next question is, whether that deed could have the effect of defeating John J. Binford's title in the property, which by his agreement with Greanor was not to terminate until after all the purchase-price, which had been agreed to be paid by Greanor, had been paid. As to the legal title, the property was still Binford's on the 11th of February, 1876. Did or could Greanor's deed of that date have the effect of conveying the property, in prejudice of Binford's title? I think not, for very plain reasons.

It is an elementary principle of law that *nemo dat quod non habet*. The title to this property was not in Greanor, and he could not convey a title which was not in him. The finder of lost property cannot, by sale and delivery, pass away the title of the owner who lost it. The thief who has stolen property cannot, by sale and delivery, convey it to a person who buys it from him and pays him full value. There is no principle more clearly settled in the law of all countries than the principle that the mere possession of personal property does not confer title. In England an exception to the general rule in regard to markets overt and the city of London prevails; but these exceptions are not allowed in this country. The rule of *caveat emptor* holds universally with us in regard to personal property. In the in-

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terest of commerce, certain forms of *choses in action*, "payable to bearer," are held to pass by mere delivery; but I know of no instance in which specific property, not owned by the person in possession, has been held to have been validly sold and transferred by him in prejudice of the real owner.

There have been a few cases in the English courts, in which it has been intimated that sales by persons holding property not their own, where these persons have held and passed the muniments of title to the property (such as bills of lading), might *perchance* be good, but there are no definite, authoritative decisions establishing even these exceptional cases. The cases leaning most strongly in favor of such an exception are those of *Boyston et al. v. Coles*, 6 M. & S. 14; *McGregor v. Thwaites et al.*, 2 B. & C. 24; and *Williams v. Barton*, 3 Bing. 139. In the last-named case, which was one where strong equities existed in favor of the purchasers from a person who had possession of and had sold personal property not really his own (it was a case in the English Court of Exchequer Chamber), Mr. Chief Justice Best said:

Had I authority to alter the law, as the mode of carrying on commerce has altered, I would say that, when the owner of property conceals himself, whoever can prove a good title under the person whom the concealed owner permits to hold it, should retain that property against the owner. But this is not the law of England. Possession is not proof of property. . . . The exception in our law (of sales in market overt by persons having property in possession) proves that if a person acquires possession of property in any mode other than in market overt he cannot keep it against the owner.

It is only where the title to property is evidenced by muniments of title, and these instruments are left by the owner in the hands of the person in possession, and that person is enabled, by these muniments of title, to hold himself out as the owner of the property, that there can even be a *question* whether that person can, by sale, pass title to a *bona fide* purchaser. A pawnee cannot, as a general rule, have a better title than the pawner, or a vendee than a vendor; and it is only where the owner of goods has lent himself to accredit the title of another person, by placing in his power those symbols of property which usually accompany and evidence the title, and has thus enabled him to hold

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himself out as owner and purchaser of them, that even a *question* can arise whether one, other than the owner of goods, can sell the title of them.

A case of this sort was that of *Boyson v. Coles*, in 6 M. & W. 24; and it was there held that, in spite of the equities shown in the case, the vendee of property took only such title as the vendor held, and was bound by the rule, *caveat emptor*, and could not pass the real owner's title to the property. In *Dyer v. Pearson*, 3 B. & C. 42, Ch. J. Abbott said :

The general rule of the law of England is, that a man who has no authority to sell cannot, by making a sale, transfer the property to another. There is one exception to that rule, viz.: the case of sale in market overt. . . . Now, this being the rule of law, I ought (it was on a motion for a new trial) either to have told the jury, that even if there was an unsuspecting purchase by the defendants, yet as *Smith* had no authority to sell, they should find their verdict for the plaintiff; or I should have left it to the jury to say whether the plaintiffs had, by their own conduct, enabled *Smith* to hold himself forth to the world as having not the possession only, but the property; for, if the real owner of goods suffer another to have possession of his property, *and of those documents which are the indicia of property*, then, *perhaps*, a sale by such a person would bind the true owner. *That would be the most favorable way of putting the case for the defendant*; and that question, if it arises upon the evidence, ought to have been submitted to the jury. It is unnecessary to consider what would be the effect of the evidence upon that question.

But the word *perhaps*, used by the learned judge, shows that it is still a question whether possession of the property *and of the documentary muniments of title*, and the holding himself out as the owner, enables the holder to pass a title.

In the light of the decisions which I have noticed, I do not think there can be a doubt of the law on this subject. The title of Binford in the property in question still existed on the 11th of February, 1876. It was not in Greanor; and, therefore, Greanor's sale of the property was, in fact, only a sale of his interest in the property. It was a sale which was subject to the title of Binford; and I will therefore make a decree directing that the report of the register be confirmed, subject to the exceptions made to it by John J. Binford, which are sustained.

From the decree of the District Court based on the foregoing

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opinion, there was an appeal to the supervisory jurisdiction of the Circuit Court, which reversed the decree for reasons stated in the following opinion of

BOND, J.—This is a dispute between John J. Binford, of Richmond, and Dohan, Carroll & Co., of New York, as to which of the parties has the prior right to have its claim against John H. Greanor paid in full out of the proceeds of the sale of certain property of the bankrupt.

Dohan, Carroll & Co. claim under a deed of trust made by Greanor for their benefit, dated 11th February, 1876; and J. J. Binford under a *lien* for unpaid purchase-money, or on the ground that the sale of March, 1873, by J. J. Binford to Greanor was a conditional sale.

The facts of the case, briefly stated, seem to me to be as follows. On the 11th of March, 1873, J. J. Binford bought at auction certain tobacco-manufacturing fixtures, paying for them the sum of five thousand two hundred and thirty-nine dollars and sixty-four cents, partly in cash and partly by a note for one thousand three hundred and sixty dollars, given him by Greanor for the purpose. Immediately afterward possession of these fixtures was given to Greanor by J. J. Binford, no bill of sale or other written document passing between them; but it is alleged by Binford, it being agreed that the transaction should be a conditional sale, and that title to the fixtures should not pass to Greanor until all the purchase-money should be paid. The books of the parties show that from time to time Greanor did pay large sums of money to Binford in settlement of this account, amounting altogether to about four-fifths of the debt, with interest.

On the 11th of February, 1876, Greanor, being in need of a further advance of money, to carry on the business of manufacturing tobacco, upon which he had entered with the fixtures obtained from Binford, applied to Dohan, Carroll & Co., his correspondents in New York. To secure this new loan and his previous indebtedness, Greanor gave a deed of trust to Dohan, Carroll & Co. of his property in these fixtures, under which deed they now claim.

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Some time after this Greanor transferred all his property in said fixtures to Charles Binford, by an instrument which recited the deed of trust given to Dohan, Carroll & Co., and certain other debts, and which expressly made the transfer subject to said debts. Shortly after C. Binford became bankrupt and the property was sold.

Such being the facts, briefly stated, let us examine the grounds on which each party claims the precedence.

First, as to the "lien for unpaid purchase-money"\* claimed by Binford. Possession is indispensable to the existence of a lien, and an abandonment of the custody of the property over which the right extends divests the lien. In such a case the vendor is deemed to surrender the security he has upon the goods, and to trust to the personal responsibility of the vendee. 3 Par., Contracts, 243—4, cases there cited.

There is no better settled rule of law than this, and the reason of it is most obvious. For were it not so there would be no safety in any purchase of personal property. It would require as long and as anxious, as well as a far more difficult search into the title of the vendor of a horse, as is required into the title to a house. For the purchaser would have to assure himself that each owner had paid in full the purchase-money to the previous owner ever since the animal was foaled in order to avoid some one taking possession under a "lien for unpaid purchase-money."

It is alleged, however, that the transaction by which the fixtures passed to Greanor from J. J. Binford, was a conditional sale, and that the title to them was not to pass to Greanor until all the purchase-money was paid. It is perfectly competent for two parties to make such an agreement, and between the vendor and vendee it is unquestionably good, the vendee taking no title until the whole of the purchase-money is paid. How it affects the rights of *bona fide* subvendees, for a valuable consideration and without notice, or of attachment creditors, is another and

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\* No claim of lien was asserted in the District Court, and in the language quoted, if quoted correctly, the word "lien" must have been inadvertently used; the question was simply one of *title* not of *lien*.

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more difficult question, upon which the authorities are divided. It seems, however, to be settled that there must be an *express* agreement to that effect, and that the burden of proof is upon the vendor who claims against creditors of the vendee; moreover, it being in the nature of a secret agreement, it is not looked upon with favor and must be strictly proved. *Leighton v. Stearns*, 19 M. E. 154; *Haggarty v. Palmer*, 6 Johns. Ch. 437; *Keeler v. Field*, 1 Paige, 315; *Smith v. Lyons*, 1 Seld. 41.

Moreover the vendor must be guilty of no *laches* in permitting the subsale, for if he be he is estopped to deny the title of his vendee. *Benj., Sales*, 580–81. Cases cited.

Now applying these rules, it seems to me that there is no sufficient proof of an express agreement made at the time of the sale, nor do the subsequent acts of the parties tend to show that there was any such express agreement between them. And, moreover, if there were such proof the vendor (Binford) has been guilty of such *laches* as to estop him from claiming the benefit of it. For if there was such an agreement as claimed, yet the vendor silently allowed the vendee, first, to make a deed of trust of the property, then to convey it, and finally allowed it to be sold for the benefit of the creditors of the subvendee. Can he now come forward and say that in point of fact the title had always remained in himself? To quote the words of Tindal, C. J., in a similar case:

He, the vendor, is estopped by his own admissions, for unless this amount to an estoppel the word may as well be blotted from the law.

Binford then can claim no priority over other unsecured creditors, and the report of register Atkins should, I think, have been confirmed, and an order will be passed accordingly reversing that of the District Court.

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Opinion of the court.

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*United States Circuit Court, Eastern District of Virginia, at  
Richmond, July Term, 1879.*

ATKINS & CO. ET AL. v. THE PETERSBURG RAILROAD COMPANY.

ON THE PETITION OF HIRAM SIBLEY, JOHN B. DAVIS,  
THOMAS WILSON, AND J. D. EVANS.

When the company defendant was in difficulty, before the appointment of a receiver, from its employees threatening to strike for the non-payment of wages due for months past, and on appeal by its officers to the petitioners, who were holders of bonds, they advanced the money necessary for the payment of the back wages due, on a distinct understanding that they should be reimbursed out of the first net earnings of the company, and that the money advanced should be paid to the employees; and afterwards, before their reimbursement, the road went into the custody of the court under the appointment of a receiver.

*Held*, that the advances must be paid in preference to the claims of mortgagees, out of income accruing while the road was in the custody of the court.

IN equity.

*Frank W. Christian appeared for the petitioners.*

*H. H. Marshall and J. Wesley Friend, for the trustees of the mortgagees.*

The opinion of the court recites the facts of the case.

HUGHES, J.—The petitioners, Hiram Sibley, John B. Davis, Thomas Wilson, and J. D. Evans ask for payment, in preference to bonds held under first and second mortgages, of certain moneys advanced to the president of the Petersburg Railroad Company, after default in payment of certain coupons and before the filing of the bill for the appointment of a receiver. The advance was made on an understanding with the president and directors that they should be paid out of the first net current revenues, and that the amount advanced should be used in paying off back wages due to the employés of the company.

Each of the petitioners had at the time of the advance second mortgage bonds of the company, each of them except Davis was

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a stockholder, and Davis had made large advances to one Ragland, personally, on a pledge of shares owned by Ragland, who, until recently before the advances of the petitioners, had been president of the company.

Some time in the first half of the year 1875, Ragland resigned, a new board of directors were appointed, and another president was elected. Davis and Sibley were elected members of this new board in their absence, and I believe against their consent, but Sibley refused to serve, and though Davis protested against being assigned to the position, he never actually resigned. Davis held the additional relation to the company of a trustee with Thomas Branch in the deed securing the second mortgage bonds. Isaac H. Carrington was elected president.

Shortly after this reorganization of the company its affairs came to a serious crisis in the form of a threatened strike of its employés for wages in arrears. The amount of the arrearage was about \$27,000, and it was necessary for the new president to raise this sum of money without delay. In his extremity he appealed to the petitioners to advance the amount needed. Although the fact is disputed by J. Wilcox Brown, trustee in the first mortgage, and by Thomas Branch, trustee in the second mortgage, who resist this petition, the evidence that that was the object of the petitioners in making the advance, and that they made it on a specific appeal from President Carrington for that particular purpose, is conclusive. Moreover the evidence shows that the advance was made for this object on an understanding between the petitioners and President Carrington, approved by all of the directors but one, who was absent from sickness, that they should be reimbursed their advance out of the first net earnings of the road. The amount advanced was \$26,500, and it was paid by the petitioners at several dates, from July 28th to August 6th, 1875. This particular fund was deposited in the Planters' National Bank of Richmond, of which Davis was president; the current earnings of the company were deposited in other banks. In his letter relating to the advance, dated in New York, 26th July, 1875, Mr. Sibley said to President Carrington :

This amount is to pay the men on the road. I regard the labor on the road as the first lien on the property. Mr. Davis will give

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you an equal amount, which will pay or nearly so, the arrears. I want you to send me your receipt for the ten thousand and a certificate that Mr. Davis has paid an equal amount for the purpose, with an agreement that these advances by me and Mr. Davis are to be refunded to us in equal amounts out of the first net profits of the road. It is desired that the men be paid off at once, in order that any may be discharged that are not wanted, etc.

The reply of President Carrington to this letter is not given in the evidence, and if ever sent in writing, would seem to have been lost. But letters from him to Mr. Sibley are in proof, written in November and December following. In that of November 1st, 1875, Mr. Carrington says:

So far as respects the \$20,000 advanced by Mr. Davis and yourself, and the \$6500 advanced by Evans and Wilson, I look upon them as debts standing upon a different footing from all other debts of the company. They are for cash advanced to the company without security, at a time when it was necessary to the life of the company, etc.

In a long letter of November 23d, explaining his financial plans and efforts, Mr. Carrington uses similar language, and in his letter of December 29th, 1875, the same officer says:

Mr. John B. Davis has demanded that the first payments to be made, over and above actual running expenses, shall be, upon the four loans, made to the company which are unsecured, viz.: \$10,000 by you, \$10,000 by J. B. Davis, \$3250 by Thomas Wilson, and \$3250 by Evans. I acquiesce in this. I suppose you and Mr. Davis understand each other. I expect to send you a check for \$2000 during this week, and to pay Mr. Davis a similar amount, and my expectation is to pay you both \$3000 more by February 1st, making \$5000 to each in part of above loans.

Mr. Davis, in his deposition, says:

The advance was for the purpose of paying off the employés of the road, and the agreement by the president, Mr. Carrington, was that it should be repaid out of the first earnings of the road.

Isaac H. Carrington says, in his testimony:

I was elected president of the Petersburg Railroad Company on the 19th of July, 1875. The road at that time was in very bad condition; the iron was so much worn as to render travel unsafe; the ditches were generally filled up; there were many unsound ties in the track; the rolling stock needed repair; there were very few

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laborers employed as track hands; many of the employes had brought suit for their wages and recovered judgments in North Carolina. Two engines of the company had been levied on under executions on these judgments, and were in possession of the sheriff; other judgments had been obtained against the company in Virginia; the company was without credit, and its operations were suffering for want of necessary supplies of all kinds. Amounts due to the company from connecting roads had been attached at Baltimore. A few weeks before my election as president, I had made a full examination of the affairs of the road. On my election I represented to John B. Davis and Hiram Sibley in person, and to other stockholders by letter that the condition of the road rendered an immediate advance of money necessary. There were past due wages to employes amounting to between \$27,000 and \$29,000, and I told them that it would be impossible to manage the road with any success unless payment was made to these employes. I also represented the absolute necessity for immediate outlay on the track and rolling stock; also, that there were debts due and secured by collateral, and that there was imminent danger that the collateral would be sacrificed at forced sale. Four of the stockholders responded to this appeal by making the following advances (these have been already stated). There was no written contract stipulating the terms or conditions of this loan. There was an understanding that the object of the loan was to enable me to pay wages, and my recollection is that Hiram Sibley particularly insisted that his money should take that direction. I executed the notes of the company at four months (I think), and they were renewed at maturity. I resigned the office of president in January, 1876, and do not know what was done with these notes afterwards; our distinct understanding with these gentlemen was that theirs was to be considered a debt of the highest obligation, and I stated to them that if they loaned the money, and I afterwards found that I could not get on with the road, I would devote its receipts to the payment of these notes. I file as part of my deposition three letters, etc. (describing the three letters already quoted from, written by himself to Sibley in November and December, 1875).

As tending to show that this was not the understanding on which the advances in question were made by petitioners, the defence produce the account of the company with the Planters' National Bank, of which Mr. Davis was president, from which it appears that this specific money was not all paid specifically in discharge of wages in arrear, but went in part to other purposes, and especially that \$5000 of it were paid to the counsel of a judgment creditor of the road, in part payment of his debt (paid as the evidence shows without the knowledge of Davis).

This creditor was the one on whose bill for foreclosure, this

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court appointed a receiver and took possession of the road in May, 1877; but under a consent decree. This matter is referred to by Mr. Carrington in his testimony in answer to a question by the defence, whether all the money advanced by Davis, Sibley, Wilson, and Evans was applied to the payment of back dues to the employés of the company. Mr. Carrington says:

It was not. On the 29th of July, 1875, I paid, in part of the judgment for wages due in Weldon, \$3777; and on the 7th of August, 1875, I paid \$6500 on pay rolls for the months of June and July, 1875. The policy I adopted and which I followed as long as I was president was, to pay current wages as they matured, and thus carry the payments back month by month as I was able. . . . When I received these loans I deposited them in the Planters' National Bank of Richmond. . . . Under the arrangements under which I borrowed this money I did not consider myself bound to apply this identical money to the payment of wages; but, if there was pressing necessity from other directions, I felt at liberty to use this money for that purpose, thus relieving current receipts, and looking to current receipts to replace it. I did feel bound to apply an amount equal to these loans to back wages, and continued to make such application from time to time during my presidency. The payment of the pay rolls for June and July, and the partial payment of the judgments of Weldon entirely restored the confidence of the employés, and they were willing to wait, I giving frequent assurances that I would continue the payment as fast as I could.

It would seem in short that the back wages for which the advances were made by the petitioners were all paid off in the course of time, but not in whole with the specific money advanced for that specific purpose, and deposited in the Planters' National Bank. A great deal of the testimony put into the case by the defence (in fact much the greater part of it) relates to the history of the difficulties of the company subsequent to this advance of money, to transactions directly or indirectly connected with the subsequent filing of the bill in this court for the appointment of a receiver, and to the history of the bill between the time it was filed in the summer or fall of 1876 and the appointment of a receiver in May, 1877. But I do not think that this testimony at all affects the case as it appears from the letters of Carrington and Sibley that have been referred to, and the testimony of Carrington and Davis that has been given.

The fact seems to be conclusively proved that on the part of the petitioners, their money was advanced for the specific purpose of keeping the road running by the payment of arrears due its employés, and that though all the money deposited in the Planters' National Bank was not specifically used for that one purpose, yet that the equivalent of any particular part of that money which was otherwise used by the president was paid to the employés out of current receipts in time to satisfy the employés and accomplish the object for which it was advanced by the petitioners.

When I further state that the net current earnings of the road for any three or four months since the petitioners advanced the money, would have been sufficient to pay off the advance, I believe that I have stated all the facts of the case material to its decision.

Although this suit was originally brought by a judgment creditor, yet the decree appointing a receiver was given by consent, and the trustees under the mortgage deeds at once came in by cross-bill, and took the position of *domini litis* in the cause.

The questions presented by the petition are :

1st. Whether, under any circumstances, the advance of moneys to keep a railroad running without the exaction of security, can entitle the creditor to payment out of the earnings of the road in priority over the claims of mortgagees, and if this can be done in any case ?

2d. Whether the circumstances under which the petitioners in this case advanced the money which they now ask the court to repay to them, are such as will justify the court in granting their petition ?

The trustees who contest the claim of these petitioners rely upon the priority of their mortgages and the sanctity of their rights, as secured creditors, under solemn deeds.

They vouch in support of the superiority of their rights the decision of this court in the Atlantic, Mississippi and Ohio Railroad case (see *infra*, page 338), upon the petition of the Pennsylvania Steel Company, of sundry creditors holding assigned labor claims, and of sundry other holders of unsecured debts against that defendant company. I concurred in the decision in that case, 1st,

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Because the principal part of the claims then passed upon did not present the peculiar equities about to be discussed; and, 2d, Because, as to the rest of those claims, the weight of authority seemed at that time to preponderate in favor of mortgage creditors as against unsecured creditors of every name.

Since then the Supreme Court of the United States has had this whole subject before it in a group of suits connected with the Chicago, Danville and Vincennes Railroad Company, in which it has passed upon the rights of a variety of petitioners having claims adverse to the mortgagees of that railroad. Its decrees in the various petitions and suits referred to are the more important because they were made after a general invitation had been extended to members of the bar of that court interested in like cases, to present briefs on the questions arising in that case; and because, after a most patient hearing and the most searching and able argument from the best legal minds of the country, the court arrived at unanimous conclusions on this delicate, difficult, and important subject.

In the principal case before it, connected with the railroad mentioned, that of *Fosdick v. Schall*, 8 Otto, the court, through Mr. Chief Justice Waite, announced its views of the law in the following paragraphs, which though they fall within the characterization of *dicta*, yet are in fact a careful and deliberate expression of what the court considered to be the law of this whole subject. Nor is there any reason to doubt but that it will apply the principles indicated to cases which will come before it hereafter.

In the case of *Fosdick et al. v. Schall, Intervener*, the court, in the course of its decision, said as follows:

We have no doubt that when a court of chancery is asked by railroad mortgagees to appoint a receiver of railroad property pending proceedings for foreclosure, the court, in the exercise of a sound judicial discretion, may, as a condition of issuing the necessary order, impose such terms in reference to the payment from the income during the receivership of outstanding debts for labor, supplies, equipment, or permanent improvement of the mortgaged property, as may under the circumstances of the particular case appear to be reasonable. Railroad mortgages are comparatively new in the history of judicial proceedings. They are peculiar in their character, and affect peculiar interests. The amounts involved are generally large, and the rights

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of the parties oftentimes complicated and conflicting. It rarely happens that a foreclosure is carried through to the end without some concessions, by some parties, from their strict legal rights, in order to secure advantages that could not otherwise be obtained, and which it is supposed will operate for the general good of all who are interested. This results almost as a matter of necessity from the peculiar circumstances which surround such litigation. The business of all railroad companies is done to a greater or less extent on credit. This credit is longer or shorter, as the necessities of the case require; and when companies become pecuniarily embarrassed it frequently happens that debts for labor, supplies, equipment, and improvements are permitted to accumulate, in order that bonded interest may be paid and a disastrous foreclosure postponed, if not altogether avoided. In this way the daily and monthly earnings which ordinarily should go to pay the daily and monthly expenses are kept from those to whom in equity they belong, and used to pay the mortgaged debt. The income out of which the mortgage is to be paid is the *net income* obtained by deducting from the gross earnings what is required for necessary operating and managing expenses, proper equipments, and useful improvements. Every railroad mortgagee in accepting his security impliedly agrees that the current debts made in the ordinary course of business shall be paid from the current receipts before he has any claim upon the income. If for the convenience of the moment, something is taken from what may not improperly be called the current debt fund, and put into that which belongs to the mortgage creditors, it certainly is not inequitable for the court, when asked by the mortgagees to take possession of the future income, and hold it for their benefit, to require as a condition of such an order that what is due from the earnings to the current debt shall be paid by the court from the future current receipts before anything derived from that source goes to the mortgagees. In this way the court will only do what, if a receiver should not be appointed, the company ought itself to do; for, even though the mortgage may in terms give a lien upon the profits and income until possession of the mortgaged premises is actually taken or something equivalent, the whole earnings belong to the company, and are subject to its control.

The mortgagee has his strict rights, which he may enforce in the ordinary way. If he asks no favors, he need grant none; but if he calls upon a court of chancery to put forth its extraordinary powers and grant him purely equitable relief, he may with propriety be required to submit to the operation of a rule which always applies in such cases, and *do equity in order to get equity*. The appointment of a receiver is not a matter of strict right. Such an application always calls for the exercise of judicial discretion, and the chancellor should so mould his order that while favoring one, injustice is not done to another. If this cannot be accomplished, the application should ordinarily be denied.

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We think, also, that if no such order is made when the receiver is appointed, and it appears in the progress of the cause that bonded interest has been paid, additional equipments provided, or lasting and valuable improvements made out of earnings which ought in equity to have been employed to keep down debts for labor, supplies, and the like, it is within the power of the court to use the income of the receivership to discharge obligations which, but for the diversion of funds, would have been paid in the ordinary course of business. This, not because the creditors to whom such debts are due have in law a lien upon the mortgaged property or the income, but because in a sense the officers of the company are trustees of the earnings for the benefit of the different class of creditors and the stockholders; and if they give to one class of creditors that which properly belongs to another, the court may, on an adjustment of the accounts, so use the income which comes into its own hands as, if practicable, to restore the parties to their original equitable rights. While ordinarily this power is confined to the appropriation of the income of the receivership and the proceeds of moneyed assets that have been taken from the company, cases may arise where equity will require the use of the proceeds of the sale of the mortgaged property in the same way. Thus it often happens that in the course of the administration of the cause the court is called upon to take income, which otherwise would be applied to the payment of old debts, for current expenses, and use it to make permanent improvements on the fixed property, or to buy additional equipments. In this way the value of the mortgaged property is not unfrequently materially increased.

These principles strike my mind as self-evident. I do not think they can be successfully controverted. More briefly stated they are these:

The possession of a receiver is only that of the court whose officer he is, and adds nothing to the previously existing title of the mortgagees. He holds, pending the litigation, for the benefit of whomsoever in the end it shall be found to concern, and in the meantime the court proceeds to determine the rights of the parties upon the same principles as if no change of possession had taken place.

When a court of chancery is asked by railroad mortgagees to appoint a receiver of railroad property, pending proceedings for foreclosure, the court, in the exercise of a sound judicial discretion, may, as a condition of issuing the necessary order, impose such terms in reference to the payment from the income during the receivership of outstanding debts for labor, supplies, equipment, or permanent improvement of the mortgaged property, as

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he circumstances of the particular case, appear to be  
If the court should not do this in the decree ap-  
ceiver, it may enforce these equities against mort-  
per cases in later decrees.

e out of which the mortgage is to be paid is the net  
ned by deducting from the gross earnings what is  
necessary operating and managing expenses, proper  
ad useful improvements; and every railroad mort-  
f earnings, in accepting his security, impliedly agrees  
rent debts made in the ordinary course of business  
from the current receipts before he has any claim  
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the shoes of the company whose property it has  
and satisfy equities which the company necessarily  
r the benefit of all parties interested in keeping the  
and in operation.

m does not go to the extent of allowing the court to  
rpus of the mortgaged property for the purpose of  
he equitable claims described; but limits it to the  
ne fund out of which they are to be paid. It virtu-  
that the court shall pay these claims out of income  
the road is in its custody, forbidding it to fix them  
nt charge upon the property after it passes out of

The reasoning of the opinion covers cases only of  
equity and clearest good faith. It does not cover  
tures but such as were of urgent necessity, and  
the benefit of all parties interested in the property.

Supreme Court is thus severe as to the character of  
hich may be paid, and as to the funds out of which  
be made; yet it does not limit them to the pay-  
ges due employes. It allows the expenses of perma-  
ments to be refunded where those improvements

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were necessary to render the road safe for public use, and when the credit for them was incurred on the faith of their being paid for out of current earnings. There was no such pledge of faith given in the case of the Pennsylvania Steel Company, nor in favor of the holders of assigned labor claims in the Atlantic, Mississippi and Ohio case, which has been referred to.

The Supreme Court, in its opinion under consideration, makes a broad distinction between railroads (which the interests of all classes of creditors and good faith to the public who charter them for public purposes, alike require to be kept going and alive) and other property. It intimates that a court may order the payment of such debts incurred by a railroad company before the appointment of a receiver, as it may authorize a receiver to contract and pay after his appointment; provided that the *corpus* of the property be not touched.

Now it has never been questioned that a receiver may apply so much of the current *income* as may be necessary for repairing or operating the road, or may, by receiver's certificates, anticipate the future income for that purpose; and it would be difficult to draw a distinction between the principles under which a court authorizes a receiver to make necessary expenses for operating a railroad and keeping it in a safe condition, and the principles embodied in the language quoted from the opinion of the Supreme Court, relating to sundry expenses of the railroad companies incurred before the appointment of receivers.

The cases where the power to issue receiver's certificates has been denied, have been where they were to be issued, not for the *preservation*, but for the *improvement* of the property. Courts have in some instances gone even to the length of authorizing permanent improvements where the circumstances of the case called for the exercise of the power; but the opinion of the Supreme Court in *Fosdick v. Schall* does not go that far.

It is enough for us that no court has ever refused to issue such certificates when it was necessary for repairing the road or keeping it going as a safe road; and if it may authorize such expenditures by a receiver, it may pay them if they have been made by the company before the appointment of a receiver.

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s, who cannot be said to lean against the rights of  
s, in his work on Railroad Securities, sec. 537, says :

s necessary for a receiver to raise money for the purpose  
or operating a railroad, the court may authorize him to  
ble certificates of indebtedness, which shall constitute a  
he property or the proceeds of it, and shall be redeem-  
a limited time, or when the property is sold by the court.

ction 542, he says :

has power, while in possession of property, to protect it  
ad destruction, and to preserve it in the condition in  
received ; and for this purpose it may authorize the  
from the property itself of whatever is absolutely neces-  
preservation, and may do this as against any and all  
ested.

positions are fully sustained by the cases of *Kennedy*  
*etc.*, *Railroad Company*, 2 Dill, 448 ; *Meger v. Johns-*  
*. 237* ; *Hoover v. Mortclair, etc., Railroad Company*,  
Eq. 4 ; *Jerome v. McCarter*, 94 U. S. 734 ; *Vermont*  
*Railroad Company v. Vermont Central Railroad Com-*  
l in Jones's Railroad Securities, section 536 ; *Stanton*  
*and Chattanooga Railroad Company*, 2 Woods, 506.  
to me that the equity of the petitioners, Sibley, Davis,  
l Evans, falls within the reasoning of the Supreme

uence of the non-payment of their wages the employes  
rsburg Railroad Company were greatly dissatisfied,  
found that in order to retain their services some pro-  
be made to satisfy their just claims. Many of them  
ed suits and recovered judgments for their wages. In  
hey had attached property of the company and gar-  
s due to it. The officers of the company recognized  
efficient operation of the road, it was absolutely es-  
these claims should be satisfied. But the company  
money nor credit.

ate of things the petitioners made these advances, at  
of the president of the company. For it they re-  
nsideration, and from it they derived no peculiar or  
efit apart from the general advantage accruing to the

## Opinion of the court

railroad. The advance enabled the company to continue its operations, and it inured to the general advantage of all concerned in its success.

In July, 1875, the alternative presented was, that these advances should be made or the road be judicially sequestrated. The petitioners believed it could be extricated from its difficulties, and most probably it could have been but for the discredit and embarrassment of the company produced by subsequent legal proceedings against it. The petitioners did not desire a receiver, and proved their *bona fides* by this advance of their money.

But even if a receiver had been appointed in July, 1875, the first thing that would have confronted him would have been these wages. To run the road it would have been necessary to pay them. They had a claim on the road which the court would have provided for; and the company having no money, the first thing necessary for the court to do would have been to authorize the receiver to issue certificates to raise money to pay these wages, *i. e.*, to raise the money which was supplied by these very advances.

As equity regards the substance and not the form, these advances must be treated as preferred debts. The employés had a claim on the road which it was absolutely essential to the interests of all should be satisfied. These petitioners came forward on an appeal from the president, and advanced their private means, as one of the witnesses said, to save the life of the company. They were not speculators, but persons acting for the benefit of a concern in which they had a deep interest.

The right of the mortgagees to have the fund realized by the receiver applied to their debts, is equitable only; and should not be so enforced as to produce inequity. The court in a proper case is bound to attach to its enjoyment such conditions as are right and just. It would be highly inequitable to refuse to pay advances made for the benefit of mortgagees by men whom the servants of the mortgagees promised to refund out of current earnings.

This court, when it appointed a receiver, might have done so upon the just and reasonable condition that those claims were to be provided for; and, according to the opinion of the Supreme

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Court, it may equally do so by an order subsequently made, operating by way of modification of the original order. See, also, *Douglass v. Cline*, 12 Bush. 608.

I will therefore make an order granting the prayer of these petitioners.

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*United States Circuit Court for the Eastern District of Virginia.*

FRANCIS SKIDDY ET AL., TRUSTEES, *v.* THE ATLANTIC, MISSISSIPPI AND OHIO RAILROAD COMPANY\* (see 1 Hughes, 80).

1. Wages to employés past due for eight months before the order of court sequestrating the property of a railroad company and appointing receivers, were ordered to be paid to such employés as were retained in the employment of the road by the receivers.
2. The court refused to pay similar past due wages of employés, which had been assigned to third persons who petitioned for payment. It also refused to pay for steel rails and supplies furnished before the appointment of receivers on the credit of the company.
3. On petition of complainants that the receivers should be ordered to issue ten-year extension certificates to such holders of matured bonds and past due coupons as were willing to accept them, the court made the order prayed for.
4. The complainants are trustees in a mortgage of \$5,500,000, owned almost wholly in England and Holland. These bondholders are respectively represented by a London committee and an Amsterdam committee, with whom bonds are deposited, with powers of attorney. The London committee claim to have given all bondholders notice of their intention to bring this suit, and to represent all; but the Amsterdam committee deny this, and claim to represent \$2,000,000 of bonds, and aver that the London committee represent only about \$2,000,000. It is certain that the Amsterdam committee represent a very large number of bonds, approximating the amount which they claim to represent. This agency, showing powers of

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\* The documents set out in this report are given for their value as precedents in equity.

For bill of complainants, see pages 322 to 333.

For decree appointing receivers and awarding an injunction, see pages 334 to 337.

For sundry opinions of the court, see pages 338, 341, 348, and 354.

For final decree of foreclosure and sale, see pages 365 to 381.

Statement of the case.

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attorney, file a petition setting out grounds for disapproving the trustees' management of the suit, denying that the trustees represent their interests satisfactorily, and praying to be admitted as parties defendant to the suit. Their prayer was denied by the court, the opinion of the circuit judge prevailing; the district judge dissenting from this ruling of the court.

5. The defendant in this case (the Atlantic, Mississippi and Ohio Railroad Company) was consolidated, under an act of the Virginia Legislature, of three other companies, one of which is the Virginia and Tennessee Railroad Company. The process of consolidation authorized was, that shareholders in the divisional companies were allowed to subscribe their stock to the stock of the consolidated company. So nearly all of the stock held in two of the divisional companies was stocked into that of the consolidated company, that those two companies practically went out of existence. But the case was different with the Virginia and Tennessee Company, 3389 shares in which remain outstanding. The charter of consolidation, in terms, keeps alive the company so long as this stock remains in its present status. Several mortgages executed before consolidation by this Virginia and Tennessee Company remain unsatisfied. The amount and priorities of the debts they secure were part of the subject of reference to a commissioner in this suit, and of the decrees of the court. Parties in interest prayed that this company should be made a party defendant to the suit.

The court, composed of Chief Justice Waite and Circuit Judge Bond (District Judge Hughes dissenting),

*Held*, That this company was not a necessary party defendant, and denied the prayer of the petitioner.

In equity.

The line of railroad consolidated under the company, which is the defendant in this suit, was originally owned by three several companies. The Norfolk and Petersburg Company owned the road between those cities. The Southside Company owned the road between Petersburg and Lynchburg. The Virginia and Tennessee Company owned the road between Lynchburg and Bristol, a town on the border of Tennessee. There was also a fourth company, chartered for the purpose of extending the line to Cumberland Gap, called the Virginia and Kentucky Company; and this company was also consolidated with the other three by the legislation about to be described; but none of its road was ever completed, and it was afterwards, by later legislation, dropped out of the consolidated company, and its connection with the subject will not be regarded in what follows.

By an act of the General Assembly of Virginia, passed the

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17th June, 1870, the four several railroad companies just named, the lines of the three first of which reached from Norfolk to Bristol, a distance of four hundred and seven miles, were authorized to be consolidated into one company by the name of the Atlantic, Mississippi and Ohio Railroad Company, upon such terms as the stockholders of such company in general meeting might agree upon, but with no power to compel any stockholder in any divisional company to exchange his stock in such company for stock in the consolidated company; each company to retain an existence as such for certain purposes until all its stock should be subscribed by its owners to that of the consolidated company, at such estimate of comparative value as should be agreed upon by the companies in general meeting. The stock held in the Norfolk and Petersburg, and the Southside Companies was virtually all stocked into the Atlantic, Mississippi and Ohio Company. That in the Virginia and Tennessee Company was also all stocked in, except 3389 shares, of the par value of \$100 per share.

The conditions of the act of charter, of June 17th, 1870, were otherwise fully complied with in general meeting of the companies, and the consolidated company was formed in November, 1870.

The remaining facts of the case are recited in the bill of the complainants, the substance of the more material portions of which are as follows:

BILL OF THE COMPLAINANTS.

*To the Judges of the Circuit Court of the United States for the Eastern District of Virginia, Fourth Judicial Circuit:*

Your orators, Francis Skiddy, William Butler Duncan, and Samuel L. M. Barlow, of the city, county, and State of New York, and citizens respectively of the said State of New York, trustees as hereinafter more particularly set forth, bring this their amended bill against the Atlantic, Mississippi and Ohio Railroad Company, a corporation created, organized, and established under and by virtue of the laws of the State of Virginia, and a citizen of the State of Virginia, George Blow, Jr., Richard H. Chamberlain,

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Statement of the case.

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George W. Camp, John S. Tucker ; the city of Petersburg, John Mann, executor, etc. ; Martha Wallace, W. H. F. Lee, and W. N. Bolling, executrix and executors, etc. ; Richard G. Pegram, Odin G. Clay, Thomas S. Bocock, Abram S. Hewitt, C. L. Mosby, C. W. Purcell, F. Johnson, R. J. Davis, R. H. Maury, D. H. Miller, trustees, etc. ; the Board of Public Works of the State of Virginia, and also specially the State of Virginia, in so far as said State can be made a party, as hereinafter mentioned, or shall elect to come in as a party ; and thereupon your orators complain and say :

That, on the 9th day of September, A.D. 1871, the defendant, the Atlantic, Mississippi and Ohio Railroad Company was, and now is, a corporation duly created, organized, and established as aforesaid, under and by virtue of the laws of the State of Virginia, and owning and operating a continuous line of railway from the seaport of Norfolk, in the said State of Virginia, to Bristol, in the State of Tennessee, and having due authority of law to extend the said line to Cumberland Gap, in the State of Kentucky, and did possess due authority of law to execute a mortgage upon its said line of railroad property and franchises, for the sum of fifteen million dollars, to secure the bonds of the said company, to be issued, negotiated, and sold for the purpose of raising money for the use and benefit of said company. That on the said 9th day of September, A. D. 1871, the said company did execute and deliver to your orators its certain indenture and deed of trust and mortgage, wherein and whereby the said company did convey to your orators, for the consideration and upon the trusts therein fully and at large set forth, all the right, title, and interest of the said company which the said company then possessed, or might thereafter acquire, in and to all and singular its franchises and entire line of railway, constructed or to be constructed, extending from Norfolk, aforesaid, to Cumberland Gap, aforesaid, together with all branches thereof, constructed or to be constructed, together with the tolls, incomes, rents, issues, and profits thereof, and all real estate, rights of way, easements, fixtures, rolling-stock, machinery, tools, and equipments, and all other personal property thereunto belonging ; but in and by the said indenture, among other things, it was and is provided and declared that the premises aforesaid were conveyed to your orators to secure the bonds

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of the said company to the amount, in the aggregate, of fifteen millions dollars; that is to say, fifteen thousand bonds of one thousand dollars each, bearing date even with the said indenture, payable in gold coin of the United States, thirty-three years from the said date, with interest coupons thereto attached for the payment of interest thereon semi-annually, at the rate of seven per cent. per annum, in gold coin of the United States, or in British sterling, at the option of the owner.

And for the equal benefit and security of all persons or corporations who might become holders of any of the said bonds, without preference, it was further provided that if default should be made in the payment of any of the interest coupons upon any of said bonds then outstanding on the demand of the *bona fide* holders of said coupons, representing at least one-fifth of the bonds secured by said indenture, and within ninety days after the said demand, your orators, trustees as aforesaid, should enter upon the mortgaged premises and take possession thereof, receive the rents, tolls, and income thereof, and apply the same as herein provided; and might proceed to sell, upon and after certain notice therein provided for, the mortgaged premises, or so much thereof as might be necessary to raise and produce the amount of money then due by the said company, and in arrear in respect of the said mortgage bonds; and it was further provided, in case of default in the payment of such bonds at maturity and the continuance thereof for the period of ninety days, and upon the demand of the holders of one-fifth in amount of said bonds remaining due at the time, then, if required by the *bona fide* holders of one-fifth of the said amount of bonds, your orators, the survivors of them, or their successors, should enter upon the premises and take possession of the entire property, lines of railroad and franchises of the said company, and proceed by their duly appointed agents to conduct the business of the same and control its various receipts and disbursements until the amount of any past due and unpaid principal and interest shall have been duly discharged; or, in their discretion, proceed to sell the premises, or so much thereof as might be necessary, at public auction on certain notice therein provided for, and execute good and sufficient conveyance thereof to the purchasers. That after the execution and delivery of the said indenture to

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your orators, the said company issued, negotiated, and sold in the open market, bonds of the said issue, to the amount, in the aggregate, of five millions four hundred and seventy thousand dollars, all of which are now outstanding in the hands of *bona fide* holders.

Five millions five hundred thousand dollars additional of the said bonds were deposited by the said company, to be exchanged, under the supervision and direction of your orators, for certain prior mortgage bonds of the said company, then outstanding. \$474,000 of such bonds have been issued and so exchanged; and the remainder of the said bonds have not yet been issued by the said company, are under your orators' control, and constitute no lien upon the mortgaged premises.

Four thousand additional bonds of the fifteen thousand were authorized to be created for the purpose of extending the line from Bristol to Cumberland Gap, but they were never issued, and the company was released by the Legislature from the duty of constructing such extension of road.

The said company continued to pay interest according to the tenor of the said bonds, as it became due and payable, to and inclusive of the first day of October, 1873, on the said five thousand four hundred and seventy bonds so issued, negotiated and sold, as hereinbefore stated.

The said company made default in the payment of the interest which became due upon the said bonds on the first day of April, 1874; subsequently the said company paid the interest, which became due on the 1st April, 1874, as aforesaid, one-half of the interest, which became due on the 1st October, 1874, and one-half of the interest on the said bonds which became due on the 1st April, A.D. 1875. It has paid no interest on the said bonds since the date last aforesaid, and all of the interest accruing on the said bonds since the date last aforesaid, as well as one-half the interest thereon due on the first day of October, 1874, and one-half of the interest due April 1st, 1875, now remains due and unpaid.

Your orators are informed and believe that when, and as the interest aforesaid became due and payable, according to the tenor of the said bonds, payment thereof was duly demanded by the

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holders, respectively, of interest warrants or coupons; and that if, in case, formal demand was omitted, and such omission was in pursuance of notice on the part of said company that such interest would not be paid. That payment was refused by the said company and its agents; that public notice was given of the inability of the said company to make such payment, and that various negotiations have, from time to time, been had between the said company, its agents and the holders of such bonds and coupons, to the end of inducing such holders to forbear proceeding to enforce the mortgage security therefor, and to grant time and indulgence to the said company for the payment thereof, all of which negotiations have failed.

Your orators further say that the said Atlantic, Mississippi and Ohio Railroad Company was, in pursuance of the said act of the General Assembly of the State of Virginia, approved June 17th, 1870, created by the consolidation of the following railroad companies theretofore created and then existing as separate and independent companies, that is to say :

The Norfolk and Petersburg Railroad Company, owning and operating a railroad extending from Norfolk to Petersburg.

The Southside Railroad Company, owning and operating a railroad extending from said Petersburg to Lynchburg.

The Virginia and Tennessee Railroad Company, owning and operating a railroad extending from Lynchburg to Bristol aforesaid.

Your orators are informed and believe that prior to the 17th day of June, 1870, and prior to the execution and delivery to your orators of the indenture aforesaid, the property and franchises of the several railroad companies so consolidating, and whose railroads respectively became the property of the said defendant company, and were mortgaged as aforesaid by the defendant company to your orators, had been incumbered by sundry mortgages to sundry persons as security for certain debts of the said companies respectively, and that the said incumbrances, to the extent that they are valid and subsisting liens, are prior in point of time to the lien of the mortgage or deed of trust to your orators.

Your orators are informed and believe that the said mortgage

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debts, in the aggregate, now amount to the sum of about \$5,493,008.11, the interest on which is payable semi-annually, and that half-yearly interest thereon, amounting to about the sum of \$176,239.18, will become due on the first day of July next; and your orators are informed and believe that the said defendant company does not expect or intend to pay such interest at maturity, and that default in the payment thereof will expose the rights and interests of your orators to great jeopardy.

Your orators pray that it may be ascertained what amount is due, and to whom, in respect of the said several prior liens; and that when ascertained, such order and direction may be given that the foreclosure and sale hereafter prayed for may be made, subject to the lien thereof, upon such terms as may seem to be just and equitable.

Your orators say, as they have before said, that they are ignorant of the names of the person or persons to whom the said several prior mortgages or deeds of trust were executed and delivered.

And your orators pray that, when discovered, they may have leave to make such person or persons, respectively, parties defendant hereto, if they shall be advised that it is proper or necessary to make them such parties.

Your orators are informed and believe, that prior to the execution of the deed of trust aforesaid to your orators, the following deeds of trust or mortgage were executed, delivered, and recorded by the several corporations hereinafter mentioned, owning and operating respectively at the respective dates hereinafter mentioned, part of the premises conveyed to your orators, all of which deeds of trust or mortgage remain of record uncanceled, that is to say. (Here follows a list of the divisional mortgages.)

Your orators are informed and believe that the State of Virginia has or claims to have some interest in the mortgaged premises, by way of lien thereon, subsequent, however, and subordinate to the lien created by the aforesaid mortgage or trust deed to your orators. Your orators are informed and believe that this claim is made on behalf of the State of Virginia, under and by virtue of a certain act of the General Assembly of the said

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State, approved June 17th, 1870, entitled "An act to authorize the formation of the Atlantic, Mississippi and Ohio Railroad Company," and under and by virtue of a certain covenant to stand seized, in the nature of a mortgage made to the defendants, the Board of Public Works of the State of Virginia, for the benefit of the State of Virginia, by the said defendant, the Atlantic, Mississippi and Ohio Railroad Company, dated on the 22d day of December, 1870, a copy whereof is annexed hereto in schedule (A), to which said act of the General Assembly, and the said covenant to stand seized, your orators crave leave to refer, from time to time, as they may be advised, and as occasion may require, and with like effect in respect of such act of the General Assembly as though the same were herein set out at length.

Your orators further say, on information and belief, that the said company is indebted to various persons, whose debts are unsecured by any lien upon the mortgaged premises, to an amount exceeding one million dollars, including a large debt for labor to its servants, agents, and operatives employed in the management of its said road, and the conduct of its general business, in an amount, as your orators are informed and believe, exceeding the sum of \$195,000, the wages of such persons being unpaid and in arrear, as your orators are informed and believe, for a period of more than six months, and that by reason of such non-payment of wages, if the same shall be continued for any considerable length of time, the mortgaged premises will be in imminent danger of irreparable injury and liable to waste and destruction.

Your orators are further informed and believe that there are sundry judgments against said company outstanding and unsatisfied; but your orators have no information or belief as to the amount thereof, or as to whether such judgments, if any, do or do not constitute a lien upon the mortgaged premises, or any part thereof; and they pray that the facts in this behalf may be ascertained.

And your orators, upon their information and belief, further say, that \$5,430,000 in amount of the bonds issued under the said mortgage to your orators, commonly called the consolidated mortgage, and which are now outstanding in the hands of *bona fide* holders, as aforesaid, were issued, negotiated, and sold by the

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said railroad company, under and upon the faith of the representation of the said railroad company, made through its president to the purchasers and takers of said consolidated bonds; that of the whole issue of \$15,000,000 of such consolidated bonds \$5,500,000 were to be specially appropriated to and reserved for taking up the prior mortgage bonds of that aggregate amount upon separate portions of the said railroad line, and which are commonly called the divisional bonds; \$4,000,000 were appropriated to and specially reserved for the projected extension of said railroad from Bristol to Cumberland Gap, no part of which has ever been constructed; and the proceeds of the remaining \$5,500,000 of such consolidated bonds were to be applied to paying off the entire floating debt of said railroad company then existing, and to repairing, completing, equipping, and putting in full, complete, and suitable condition the entire line of said railroad in the State of Virginia, extending from Norfolk *via* Petersburg and Lynchburg to Bristol, on or near the State line between Virginia and Tennessee, and that the proceeds of said \$5,500,000 of bonds would be amply sufficient for the fulfilment of all those objects and purposes; and it was then represented by said company to the purchasers of said bonds that the amount of its then floating debt was only about \$771,000, exclusive of such as was being temporarily contracted for the purposes of the reparation of said line between Norfolk and Bristol, by way of anticipating the proceeds of such \$5,500,000 of bonds while the arrangements for the negotiation thereof were in progress, and to be provided for out of such proceeds when received. And it was then further represented by the said company to the parties to whom the said consolidated bonds were negotiated, that the net income of the said railroad would unquestionably be much more than sufficient to meet all the current interest on the consolidated bonds which were issued, and upon the prior divisional bonds. (Here follows a financial statement.)

Yet the said company is in default for interest on said consolidated bonds during said period to the extent of some \$600,000, besides having made no provision for the large amount of interest falling due on 1st July, 1876, upon the divisional bonds; and in place of having paid off and extinguished their floating debt out

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of the proceeds of such consolidated bonds, in accordance with their representations and promises, they have, as well as can be judged from their published reports and statements, actually increased the amount of such floating debt. (Here follows a financial statement.)

And it is notorious and is given out by the said company itself, that the funds for the payment of the interest on divisional bonds, falling due July 1st, 1876, are not and will not be on hand, and that such interest cannot be paid by the company, and thus in the management of the company and the application of its revenues, since the first day of July last, there has been a misapplication and diversion to the extent of more than \$300,000 of the net income of the road from the purposes to which it is pledged by the mortgage deed and to which it ought to have been devoted; and if the road be left in the hands and control of the company, there is imminent danger, and, in fact, substantial certainty, that the like course will be pursued by them in the future.

And your orators further show that it is absolutely essential to the protection of the rights and interests of the consolidated mortgage bondholders, as well as for the interest of the public interested in the travel and traffic of said railroad, that the whole line from Norfolk to Bristol should be held together and maintained as one entire property.

That by reason of the aforesaid misapplication and diversion of income and the failure of the company to make provision for the interest falling due on the first of July next, on the divisional bonds, there is imminent danger of foreclosures taking place on the divisional mortgages, and a consequent breaking up of the consolidated line, and great sacrifice of the property, rights, and interests of the consolidated bondholders, unless the said railroad be at once taken out of the hands of the company and placed in the hands of a receiver or receivers, so that a proper application of its revenues for the future may be secured, and due order may be taken for the avoidance of foreclosure of the divisional mortgages, either by raising means for the payment of the divisional mortgage interest upon the credit of the property, or otherwise.

And your orators further show that the whole of said mort-

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gaged property in its present condition is an insufficient security for the payment of the consolidated mortgage bonds which are outstanding in the hands of *bona fide* holders as aforesaid, and cannot be expected to produce upon the sale thereof, subject to the divisional mortgages, a sum sufficient to satisfy said consolidated mortgage bonds now outstanding in the hands of *bona fide* holders, or to result otherwise than in a large deficiency remaining due thereon.

That a sale of a parcel or parcels of the mortgaged property to satisfy only the interest due would be substantially impracticable, because of the existence of the prior mortgage liens thereon, and if the same were practicable, it could not result otherwise than in enormous sacrifice and loss.

That a sale in parcels for such purpose of property other than the roadway, stations, and other fixed property, could only be of rolling stock and materials and supplies, thus rendering the future operation of the road and the obtaining of income therefrom impracticable; that a sale for such purpose of a parcel or parcels of the road itself, if at all practicable, would be an immense sacrifice and loss in respect of the value of the property as a whole, and that if a sale is to be made at all, it must necessarily be of the whole property as an entirety in order to avoid great loss and injury, and, in fact, enormous sacrifice to the parties interested in the sale and its proceeds.

Your orators further say that the said company is insolvent, possessing no property of any considerable value, other than the mortgaged premises; that the mortgaged premises are an entirely *inadequate security for the several mortgage liens thereon*; and that the current revenues and income of the said road are being diverted and appropriated by the said company to other purposes, and to the payment of other debts than those secured by the indenture to your orators, and by several prior mortgages hereinbefore mentioned; whereas, in fact, the net revenues of the said road are entirely inadequate, as the said company concedes and admits, to the satisfaction of the payment of such current interest as it matures, and the interest on the aforesaid indebtedness secured by mortgage of the premises and the principal thereof as the same becomes payable.

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Your orators further say that they bring this their bill as trustees aforesaid, in pursuance of the request and demand, as they are informed and believe, of all the holders of bonds secured by the aforesaid mortgage to your orators, now outstanding.

Your orators, therefore, pray that a receiver may be appointed of all and singular the mortgaged premises, including all books, papers, and accounts of the said company, relating to the business of the said company, in and about the mortgaged premises, and all choses in action, bills receivable, moneys on hand or in the hands of agents, with the usual authority of receivers, in like cases, to take possession of all the mortgaged premises, books, papers, records, choses in action, bills receivable, moneys on hand or in the possession of agents, with authority to maintain and operate the said road in the usual course of business, and to do all things usual, needful, and proper in that behalf; to receive the tolls, rents, income, and earnings of the mortgaged premises, safely to keep the same, and make such disposition thereof, as he may, from time to time, be ordered and directed by this court.

Your orators further pray that the said company, its officers, agents, attorneys, laborers, and servants, and all persons whomsoever, may be strictly commanded and enjoined forthwith, on demand, to surrender to the receiver so appointed all and singular the premises whereof he is appointed receiver.

Your orators further pray that the said company, its officers, attorneys, servants, and agents, may be restrained and enjoined from issuing, negotiating, or parting with any of the bonds created under the aforesaid indenture to your orators remaining unissued.

And that they may also be enjoined and restrained from in the meantime parting with, disposing of, or surrendering to any person any part of the mortgaged premises, and from applying any money or property, the proceeds or income of the mortgaged premises, to the payment of any antecedent debt, or to any purpose other than the payment of the ordinary current expenses of operating the railroad and managing the business of the company.

Your orators further pray that an account may be had and taken of all and singular the liens of every kind upon the mortgaged premises, stating the order and priority thereof, the amount

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due in respect of each lien, and to whom; and that upon your orators complying with such terms as may be just and equitable, all and singular the mortgaged premises may be adjudged and decreed to be sold, and sold under the aforesaid indenture of mortgage to your orators, subject to all liens that may be prior thereto, and that the same may be sold at such time and in such manner as may be most beneficial to your orators, due regard being had to the rights and interests of all parties having liens upon the premises, and that the several defendants and the State of Virginia may, by such sale, be barred and foreclosed of, and from all equity of redemption, and all other estate, right, interest, lien, or claim of, in, to, or in respect of the said mortgaged premises.

And that your orators may have such further and other relief in the premises as the nature of their case shall require, and as to the court may seem meet.

Therefore will your Honors grant unto your orators the writ of subpœna, etc. (The usual prayer.)

The bill was filed in March, 1876. The defendant company filed an answer. Each party supported their pleadings with affidavits. The hearing on the motion for an injunction and for a receiver was adjourned by consent from time to time, until the 6th June, 1876, when, after full argument by Messrs. W. D. Shipman, Joseph H. Choate and W. W. MacFarland, of New York, for the complainants; and by Messrs. W. J. Robertson, James Alfred Jones, W. W. Cramp, W. W. Gordon, Thomas S. Bocock, Charles S. Stringfellow, and others, representing different interests in defence, the court (Circuit Judge Hugh L. Bond, and District Judge Robert W. Hughes, sitting) decided that a case had been made in favor of the motion, and announced that two receivers would be appointed, one to be named by the complainants, the other by the defendant company. Accordingly, Charles L. Perkins and Henry Fink were named as receivers in the decree of the court, who gave bond in \$100,000 each, the decree providing that each receiver should be responsible only for his own official acts. Legh R. Page was afterwards appointed counsel for the receivers at Richmond.

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The following is the material portion of the decree which was entered :

DECREE AWARDING AN INJUNCTION AND APPOINTING  
RECEIVERS.

The motion for the appointment of a receiver in this cause having been argued and considered, it is ordered by the court,

First. That Charles L. Perkins, of New York, and Henry Fink, of Lynchburg, Va., be and are hereby appointed joint receivers of all and singular the mortgaged premises specified and described in the deed of trust referred to in the plaintiffs' bill of complaint, including the entire line of railroad therein mentioned, all and singular the franchises, lands, tenements, and hereditaments of the said defendant company, all and singular the books, papers, and records thereof, all and singular the rolling stock, tools, machinery, engines, and all other personal property of every kind and description of the said company.

Second. That the said receivers, before entering upon the performance of their duties as such under this order, do each of them severally execute a bond with sureties to be approved as to form and sufficiency by a judge of this court, and filed with the clerk thereof in the sum of one hundred thousand dollars for the faithful discharge of his duties in the premises.

Third. That upon filing such bond the said receivers proceed to take possession of all and singular the premises whereof they are hereby appointed receivers; that they continue to run and operate the said railroad of the defendant as the same is now operated for the common carriage of freight and passengers, keeping the premises and property, both real and personal, in good condition and repair, to the end that said road may be operated efficiently and with safety to the public; that they as such receivers have authority to employ, pay, and discharge, from time to time, in their discretion, all needful laborers, servants, agents, attorneys, and counsel; to purchase and pay for all needful materials and supplies; to settle and adjust with other roads all traffic balances in the usual course of business; to make from time to time, in their best discretion, all needful and proper

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traffic arrangements with other roads for the interchange of business; to pay all taxes on the property whereof they are appointed receivers, that may be due and payable, or may become due and payable during this receivership; to prosecute and defend without the further order of this court all existing actions by or against said company; and to defend all actions that may hereafter be brought against the said company or against themselves, as such receivers, by the permission of this court, and to pay the expenses of such prosecution and defence, and also the expenses and disbursements of the plaintiffs, trustees in and about the appointment of the said receivers; to use the name of the said company in the prosecution of all such actions as they may find it proper or necessary in their discretion to bring, maintain, or defend, with full power to compromise, adjust, and settle, in their best discretion, all such actions, suits, or controversies now existing, or that may hereafter arise; to do whatever may be needful and proper to maintain and preserve the corporate organization and franchises of the company until the further order of this court, and to pay and expend such sum, and no more, for that purpose as may be hereafter, on application and hearing, ordered by this court; to redeem any and all securities of the company now pledged as security for loans of money, if any there be, if it shall be for the interest of the trust, hereby reposed in the said receivers so to do, but not otherwise.

Fourth. It is further ordered that as soon as may be, after the said receivers have entered upon the performance of their duties, they make a true, full, and perfect inventory of all and singular the real and personal property of every kind and description whereof they are appointed receivers, and which may come into their possession, and file the same with the clerk of this court, and due notice of such filing to be given to the plaintiffs' solicitors.

That the said receivers do keep full, true, and accurate accounts of all and singular their acts and doings in the premises; that they render and file with the clerk of this court such account within ten days after the expiration of every month of their receivership, and serve copies thereof upon the plaintiffs' solicitors, and that they have liberty to pass their accounts from

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time to time before Matthew F. Pleasants, who is hereby appointed a master for that purpose, on ten days' notice to the plaintiffs' solicitors after the service on them of such copy thereof; that any question which may arise on such accounting be reported to this court for examination and decision, and that such accounting, when from time to time had and completed, shall be final and conclusive upon all parties, unless on due cause shown the same shall, during the pendency of this action, be opened on special application.

Fifth. It is further ordered that all moneys coming into the hands of the said receivers, or either of them, be by them deposited in one or more safe banks of deposit within the State of Virginia, to be approved by this court or a judge thereof, to the joint credit of the receivers, to be thence drawn out on their joint order or on the order of an agent or attorney to be by them agreed upon.

It is further ordered that the said receivers, exercising due prudence and caution in the selection thereof, shall not be responsible for the wrongful acts of their servants and agents.

It is further ordered that the said receivers shall not, nor shall either of them, in any case incur any personal or individual liabilities in the operation of the said line of railroad, or otherwise in the premises by reason of any act or thing done by them or either of them as receivers, or by their servants, agents, or attorneys, the said receivers respectively acting in good faith and in the exercise of their best discretion, but the mortgaged premises shall nevertheless be chargeable with any judgment which may be established against the receivers in any action brought against them by any person under leave of this court first had and obtained.

It is further ordered that the said receivers respectively shall in no case be responsible jointly for the acts of each other, but shall be responsible only severally each one for his own acts.

Sixth. It is further ordered that all applications for interlocutory order or relief in this action by or on behalf of any party thereto, or the receiver therein, shall be made on notice by the moving party to the party or parties of at least ten days, exclu-

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sive of the day of service, and on due proof of personal services of notice, unless the notice hereby required be waived in writing.

Seventh. It is further ordered that the said defendant and all persons whatsoever, be and they are hereby strictly commanded and enjoined peacefully to deliver up and surrender to the said receivers all and singular the premises whereof they are hereby appointed receivers under the penalty attaching by law to disobedience.

And in the meantime and until the actual taking possession of the said property by the said receivers, it is ordered that the said Atlantic, Mississippi and Ohio Railroad Company, its president, officers, agents, and attorneys, be and they hereby are enjoined and restrained from disposing of or parting with any of the said property, real or personal, except in the payment of the necessary daily expenses of said road, and that the said company forthwith deposit all moneys and available balances now in its possession or control, and which may come into its possession from day to day, except what is needed for the said necessary daily expenses, in the Exchange National Bank of Norfolk, subject to the order of this court in this cause.

HUGH L. BOND,  
Circuit Judge.

Ro. W. HUGHES,  
District Judge.

The first question of importance which came up for discussion, related to the wages past due and unpaid of the employés of the road. These were in arrears for the period of eight months. Upon argument it was decided that all back wages due to employés then actually in the employment of the company should be paid. The following order was entered on a representation of Receiver Fink that such a measure was necessary to the safe and successful operation of the road, and that he could not be responsible for the consequences of a refusal of it by the court, to the property of the company or the safety of passengers:

DECREE FOR PAYMENT OF PAST DUE EARNINGS OF EMPLOYÉS.

Upon the petition of the receivers heretofore filed in this cause, it is ordered and decreed that the said receivers be, and they are

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hereby directed to pay, whenever in their judgments such payment is expedient, the arrearages of wages due the employés of defendant company, who have not assigned their claims, beginning with the pay roll for the month of July, 1875. The said payment is to be made according to the pay rolls this day filed with the clerk of this court, and to the persons therein designated. All other questions touching the subject of this order are reserved.

HUGH L. BOND.  
RO. W. HUGHES.

The next question presented was that of paying the holders of assigned labor claims and of certain petitioners who had furnished rails and other material and supplies to the company during a period of a year or more before the appointment of receivers.

On this class of claims, after full argument the court rendered the following decision :

BOND, J.—There have been filed a large number of petitions in this cause, asking that the receivers be required to pay out of the earnings of the Atlantic, Mississippi and Ohio Railroad, for materials furnished to the company shortly before the appointment of receivers, and for wages due to the employés of the company before the receivers took possession of it. The petition of George Faris is, to be paid the amount of judgment recovered against the company, upon which execution was issued and levied upon personal property belonging to it. We have thought it unnecessary to set out all the petitions, and have selected these as types of the whole. Whatever is the equity of these is the equity of all, and what is done by the court with them will be the disposition of the others.

At the time the materials which the petitioners furnished the company were purchased, the railroad corporation was indebted several million of dollars, to secure which indebtedness it had long antecedently executed and recorded a mortgage; pledging its whole property, of every kind and description. This sum of money was borrowed and loaned upon the express condition that this mortgage should be so made. When the mortgagees parted

with their money they took the precaution to require this security for its repayment.

When the parties who now seek payment for the materials furnished to the company by them, parted with their goods to the company, they did not take the precaution to require any security.

Were the court now to grant their petition, and out of the mortgaged property pledged to pay a particular debt, pay them, it would substitute the unsecured for the secured debt. If these simple contract debts for goods, furnished on the credit of the company alone, are to be paid before the mortgage debt is paid, they stand on a better footing than the secured debts. If they are to be paid *pari passu* with the mortgagees, then the mortgage is valueless.

It is suggested that these claims for materials furnished stand in a different position from the general floating or unsecured debts of the company, because the contracts were made just before the commencement of these proceedings, and the material has been used by the receivers. This can make no difference. All material furnished the company, and for which it is indebted and which was not consumed in the use, is now used by the receivers. Whether a debt be an hour or a year old can make no difference in its equity. It stands in the same relation, no matter what its age, to the secured debt of the road. To allow one of these debts to be paid, out of the mortgaged property, is to allow all. That is to say, the unsecured debt would be paid *pari passu* with the secured debt, and in a court of equity it would come to pass that the only persons who had no security would be those who had taken it.

Certain of these petitions are on the part of former employés of the road to whom wages are due for work done before the receivers were appointed. Some of these claims are presented by the employés and others by their assignees. So far as this case is concerned, there can be no distinction, their equities are the same. It is impossible to discover upon what better footing these claims stand than do those of the material-men. They are simple contract debts of the company. The labor of the employé was bestowed upon the materials furnished, and both labor and goods became the property of the company. There can be no distinc-

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tion in law or equity between a debt due for labor or for goods sold and delivered.

But in order to set up some sort of equity in this behalf, it has been argued that the mortgagees had a right to take possession of the road so soon as default was made in their mortgage, and that not having done so, they suffered the defendant company to contract these obligations, which were for their benefit.

It has never been decided yet that because a mortgagee does not immediately pounce upon his security, foreclose, take possession, and sell, that he impairs the obligation of his lien.

If a man have a mortgage on a large stock of goods of a retail merchant, and default is made, it will hardly be contended that unless possession is at once taken the lien for wages of the mortgagees, clerks, and employés is superior to the mortgage.

These petitions present cases of great hardship, but the contract for hire was with the company, not with these mortgagees, and these claimants are entitled to be paid, as are the materialmen, out of anything the company has unmortgaged. There was, at the time of these contracts for labor and material, no law of Virginia giving a statutory lien. The only lien pretended to be set up is an alleged equitable one. That the opinion of the Legislature was that no such lien existed is plain, from the fact that by the recent act of March 21st, 1877, chapter 200, an effort has been made to give such a lien as that set up in these petitions. Like that of George Farish, the executions in these cases were levied upon mortgaged property. The creditor is entitled to whatever interest may result to the company after the mortgage debt upon the road or the locomotive taken in execution is paid. He is entitled to nothing more.

When these proceedings are matured, the assets of the company will be marshalled and sold, the liens and priorities of creditors ascertained, and the proceeds of sale will be distributed according to the rules of equity, among such as have proved their debts. These petitioners must await that event.

Judge Hughes concurred.

In the course of events, the complainants filed a petition asking that leave be granted the receivers to issue receivers' ten years'

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extension certificates to such holders of bonds and coupons as had matured, or as would soon fall due, where the holders should be willing to receive them. This petition was heard at Norfolk in November, 1877 ; and the following was the decision of the court, rendered soon after, in granting the leave prayed for :

RECEIVERS' CERTIFICATES.

On the complainants' petition for leave to the receivers to accept and provide for an extension of time for paying certain obligations of the defendant to creditors desiring to forbear the collection of the principal sums due them.

This petition was, after due notice to counsel of other parties in interest, brought on for hearing, and argued on the 24th inst. The decision of the court is now delivered as follows, by

HUGHES, J.—The circuit judge was willing at once to sign the order asked for by the complainants on the 24th inst. ; but we concurred in thinking it well to take a few days for consideration, and I am now ready to state the grounds of the action of the court.

The petition of the trustees of the consolidated mortgage sets forth that certain bonds secured by certain mortgages on the divisional roads of the defendant company, and amounting in the aggregate to \$866,944, are past due, or will soon mature ; and that the holders of a large portion of them are content to forbear the payment of the principal so due, and would do so if relieved from the necessity, when collecting the semi-annual interest accruing and to accrue, of transmitting their bonds to the places of paying interest, and having each payment indorsed upon the bonds. The petition, therefore, asks, as a convenient means of making and evidencing these payments, that the receivers be allowed to prepare coupons for the payment of future interest, to be attached to such bonds as may be held by persons willing to forbear the collection of the principal due them, and to continue to receive the semi-annual interest which their bonds now carry.

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The class of bonds and obligations past due or soon to fall due, to which the petition refers, are as follows :

\$157,000 of the 7 per cent. first mortgage bonds of the Norfolk and Petersburg road which were due in 1868, and were extended to 1875, and

306,000 of the 8 per cent. first mortgage bonds of said road which were due in 1868 and were extended to 1877—the two making \$463,000 of first mortgage bonds of that road, past due.

5,000 of 6 per cent. first mortgage bonds of the Virginia and Tennessee road due since December, 1872.

260,500 of 8 per cent. bonds, called "*interest funding bonds*," issued to Decatur H. Miller, December, 1869, to take up and extend coupons of the Virginia and Tennessee road then due, and secured by deed of trust on that road.

138,444 of 8 per cent. bonds issued in December, 1873, by the consolidated company in extension of the time of paying certain coupons of the several divisional roads then about falling due, the unpaid coupons standing as a pledge for the security of these bonds issued in their stead, which will fall due January, 1879.

\$866,944 being the total amount of the bonds to which the petition refers.

The allegations of the petitioning trustees are that "the holders of a large proportion of the said liabilities are willing to extend the time for the payment of the said principal;" and that "the interest of all parties will be promoted by an order of court authorizing and directing the receivers to prepare and issue to such holders of said obligations, as are or may hereafter be willing to receive them," such certificates as are described in the petition. It will be observed that the extension contemplated is but a repetition of what was done during the defendant company's regime on frequent occasions, without objection from any source, and to the common advantage of all parties interested.

No objection is made to the prayer of the petition by any class of bondholders, a large number of whom are represented to be in favor of the arrangement. The bondholders are the only persons substantially interested in the proposal, and are the class who are naturally most intelligent, alert, and sensitive on the subject. The only objection comes from certain of the trustees of mortgages resting on the divisional roads, especially the trustees under the first and

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second mortgages of the Norfolk and Petersburg road. But the interest of trustees, in such a question as this, is merely nominal, and their powers but little more than perfunctory. Under a proper sense of the responsibility of their position it is perfectly competent for them to file formal objections to the prayer of the petition; and submit the whole matter to the judgment and discretion of the court. This, it was no doubt, their duty to do, and they have performed that duty; but, as the question presented to the court is more one of interest and of policy than of law, if the bondholders, who are the persons really interested in the proposal, consent, and no shareholder objects, the court would be slow to thwart the wishes of the former, at the instance of trustees having no substantial interest, and who are but formal parties to the record.

If any of the divisional bondholders desire to forbear the collection of the principal of their bonds, why should they be required by their trustees to foreclose? If, in forbearing, they desire a convenient and usual process of collecting the instalments of interest due them to be provided, then, what right have their trustees to object? If this road were still in the hands of its company there could be no doubt of the right and power of the company (a right which it frequently exercised) to extend the time of paying such bondholders as were willing to forbear, and to devise a convenient means whereby such bondholders could collect and make receipt for the semi-annual interest falling and to fall due. And but for the fact that this road is in the hands of receivers, who are the servants of the court, and can do nothing except by its authority, this petition would be unnecessary. It has been presented out of abundant prudence; and its prayer is simply that the receivers may have leave to adopt a convenient and usual means of enabling those bondholders, who wish to forbear the collection of the principal due them, to collect and give receipt for the interest as it shall fall due. The coupons proposed by the trustees are to cover semi-annual instalments of interest for ten years; with the proviso (to be embodied in them) that they are to be delivered up whenever they shall be called in, either by the receivers or by any company succeeding to them in the control of the road. The bondholders who apply for them

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will be bound to an extension, for ten years, of the time for demanding the principal of their bonds. But the receivers, and the company succeeding to them, will be bound to no time of extension at all, and indeed nothing at all, except the payment of such instalments of interest as shall fall due while the coupon certificates proposed shall be outstanding. No change of securities or of the rights of any party in interest can be effected by the proposition in any degree; except only, that the bondholders who choose, will be allowed to relinquish for a time their right to the immediate payment of the principal of their bonds.

As there can be no change in the rights of parties, except such as those bondholders who choose may voluntarily submit to, the only question for the consideration of the court is, whether it is for the interest of all concerned to permit the transaction proposed. The effect of the transaction will be to satisfy those bondholders who have a present right to the immediate foreclosure of certain divisional mortgages resting upon parts of the line of the Atlantic, Mississippi and Ohio road by a separate sale of those divisional roads. By satisfying them the court will diminish, and, I trust, remove, the danger of separate sales of parts of the line, and prepare the way for a sale of the road as an entirety. The court feels bound to employ every means in its power and within the scope of its jurisdiction, to prevent any disintegration of the line.

Its custody of the road has not so far been prejudicial to any interest connected with it. Leaving out of view such injury as may have been caused by the floods of the last week, the road is in better condition than ever before, while the floating debt left by the company has been diminished. During the custody and management of its receivers the bonds secured upon the divisional roads have in every instance appreciated very materially, if the court may be presumed to take note of the quotations of the markets as made known by the public prints. The bonds of the second mortgage on the Norfolk and Petersburg division have appreciated since June, 1876, from *sixty-eight cents* in the dollar to *seventy-eight cents*. The bonds of the first mortgage of the Norfolk and Petersburg divisional road have appreciated since June, 1876, from about *eighty-six cents* in the dollar to about

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*ninety cents.* Certain other of the bonds secured on divisional roads have risen as much as thirty cents in the dollar since June, 1876, when the receivers took charge of the consolidated line. It is also true that there has been no depreciation in market value during this period of any class of bonds secured on the divisional roads. The court, therefore, being aware of these facts, does not consider that it acts to the prejudice of any party in interest in adopting any measure tending to prevent and avoid the separate sale of any division of the road in foreclosure of divisional mortgages, whereby it may insure a sale of the line as an entirety.

It feels bound to pursue a policy looking to the preservation of the integrity of the road from Norfolk to Bristol, by many considerations.

If the line were broken into several parts each would be comparatively valueless. The experience of all railroad management, in this country and elsewhere, is, that lines of road broken into parts under disjointed management, cannot be conducted with economy, efficiency, or success; and are incompetent to compete with rival lines for the business of the country. If the Atlantic, Mississippi and Ohio railroad were broken at Lynchburg, in its ownership and management, the roads east of that point having little travel, would be reduced in their business to a very diminutive local trade, and, if sold with their feeble revenues, would not pay the mortgages resting upon them. If the road from Lynchburg to Bristol were detached from the line, in ownership and management, it would cease to be a part of a great avenue for the heavy products of the Western country, and would be dependent for its chief resources upon travel and light express freight, which it would carry as part of a north and south line. Running through a mountain region, it would speedily become under the heavy expenses constantly necessary to maintain it, as feeble in its revenues and resources, as when it was first consolidated in management with the roads to Norfolk.

As a consolidated line of east and west transportation for the trade of the West, this line of road has been growing in importance and public consideration more and more each year, ever since its consolidation. Western trade, the first avenue of outlet for which was the Erie Canal, and which afterwards sought the

lines of road constructed parallel and near to that work, has been tending for several years to lines on lower latitudes and shorter routes. The large business of the Baltimore and Ohio road is a striking exemplification of this tendency. The growing magnitude of the business of the Chesapeake and Ohio Railroad is another evidence of the strong tendency of Western trade to avoid frost and long lines, in favor of more southern and shorter lines. The present great and growing business of the Atlantic, Mississippi and Ohio road is a further and conclusive proof that Western trade is seeking the shortest lines across the continent to the Atlantic ports. Whether Western produce seeks to reach the Atlantic seaboard from Memphis, or St. Louis, or Louisville, or Omaha, or Chicago, the line of the Atlantic, Mississippi and Ohio road presents the shortest, and with some inconsiderable expenditure on parts not yet completed, can be made the most eligible of all the great east and west lines of railway, except probably that of the Chesapeake and Ohio road. It has the advantage of resting upon tide-water in the East, near the foot of Chesapeake Bay, whose outlet to the ocean is on the same latitude *vis-a-vis* with the straits of Gibraltar, and of terminating at the first safe port north of the dangerous Carolina coast. Its Western terminus at Bristol is a converging point for lines of railroad coming up from all parts of the Southern and Southwestern States, and from the Mississippi at Memphis and St. Louis. With a small expenditure in the direction of Cumberland Gap or of New River, Bristol or Central Depot would become the focus also of lines of railway pointing from Louisville, Cincinnati, Omaha, and Chicago, to the seaboard. When a saving of 200 miles in distance is continually offered to the trade of a vast region of country, local influences and artificial contrivances cannot, for any very long period of time, prevent it from seeking the shorter routes. The *prorating* distance from Norfolk by sail vessels to Liverpool being only 500 miles, and to New York only 75 miles, and by steamers to Liverpool only 1000 miles, and to New York only 125 miles, this tendency of trade to find outlet to the ocean by way of Norfolk over the Atlantic, Mississippi and Ohio road from beyond Bristol must continually strengthen, unless unfortunately the road should be broken into parts.

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The disintegration of the line of the Atlantic, Mississippi and Ohio road at Lynchburg would be fatal to its value as an east and west avenue of produce moving to market from the West and Southwest, and of merchandise returning to those regions from the East, the North, and Europe. The Virginia and Tennessee division would degenerate into a mere road of rapid transportation for light goods and passengers between North and South. The Southside and the Norfolk and Petersburg divisions would lose their present through trade from the Western and Southwestern States, and speedily degenerate into the unimportant local works which they were within the memories of persons not yet of matured age.

Paramount, however, to the mere pecuniary interests of the bondholders and shareholders in this line of road and its several divisions, are the public interests connected with it. The court is not unmindful of the fact that the Commonwealth of Virginia, in bestowing an expenditure of seven or eight millions of dollars upon the roads constituting this line, intended them to be more than local works, and especially intended that the Virginia and Tennessee road should be more than part of a line of north and south transportation for travel and light freights. This character of road was scarcely within the contemplation of the State. Her intention was to construct a line of east and west transportation that would bring the staple products of the Northwest, the West and Southwest across her territory to her principal cities, and at Richmond and Norfolk would place her merchants in connection with the large commercial operations of the world. The court keeps constantly in view this cardinal policy of Virginia, and has every assurance that the foreign bondholders are desirous to pursue, advance, secure, and render permanent this policy. As far as it lies within its jurisdiction, and as it may be done within the scope of its proper functions and may not impair the rights of parties in interest, the court will discourage separate accounts and separate sales of foreclosure in this suit; in order that, after disposing of the many interlocutory motions and petitions before it, it may enter a decree in foreclosure directing a sale of the whole line as one work under which this

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Opinion of Bond, J., on the Dutch bondholders' petition.

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line of road may be rendered permanently intact and indissoluble.

An order of court is, therefore, entered in accordance with the prayer of this petition.

#### THE DUTCH BONDHOLDERS' PETITION.

The five-and-a-half million loan is held in nearly equal proportions by English and Dutch bondholders. The interests of each of these classes of creditors are in charge of a committee, respectively styled the London Committee, and the Amsterdam Committee. The complainants (the trustees in this suit) are thought by the Dutch to recognize only the English Committee, and to act exclusively in sympathy with the English bondholders.

The Dutch Committee, accordingly, filed a petition in 1878, praying to be made formal parties defendant of record.

After full argument of the petition, in which the counsel for the complainants made earnest and strenuous resistance to the prayer of the petition, and after hearing the counsel for the Dutch bondholders (Mr. Ashbel Green and Samuel L. Parrish, of New York, and W. W. Henry, of Richmond), the court decided as follows, the opinion of Judge Bond prevailing, as the law of the case:

#### *Parrish v. Skiddy, Duncan, and Barlow.*

BOND, J.—The defendants of record in this cause on the 9th day of September, 1871, executed a mortgage of their railroad and effects to the complainants to secure the payment of certain bonds mentioned therein and the interest thereon as it fell due. There was default in the interest, and the complainants, the mortgagees, brought suit to foreclose the mortgage. Everything has proceeded regularly from time to time without complaint on the part of the *cestui que trusts* under the mortgage until the filing of the petition now under consideration, which is a petition by certain of the bondholders alleging that they should be made parties to the suit. The reasons given for this request are:

1st. That the petitioners are a committee known as the Am-

sterdam Committee for the protection of the rights of the consolidated bondholders of the defendant company, by which is meant that they are bondholders under the mortgage to the complainants or their representatives.

The petition then alleges that these proceedings on the part of the trustees were commenced by a minority of the bondholders, but it does not seek on that account to dismiss them, nor does it allege that the proceedings were taken against their objections or wishes.

They allege that for the protection of their interests they have appointed counsel to represent them in this country, and that they hold one-half of the bonds, or nearly so, under the mortgage above mentioned, and that not being parties to the suit upon record, they do not receive notice of the proceedings as they go on from the trustees or their counsel, and they pray that they may be made parties to the suit in order that they may take part in the proceedings in the cause as it progresses from time to time.

This petition was filed on the 21st of December, 1877, and was signed by James C. Parrish, who was not alleged in it to be a bondholder nor the counsel for any such in this court.

Upon April 4th, 1878, another petition was filed, amending the first, already referred to. In this amended petition it is alleged, first, that certain proceedings have been had heretofore between the bondholders represented by a committee of the Amsterdam Committee, with a like body representing English bondholders at London, and after a long recital of interviews between the parties of bondholders, the one in England and the other in Amsterdam, respecting the reorganization of the defendant company, it states that they could not agree upon a plan for such reorganization, and that the English bondholders had the aid of the counsel of the complainants in drawing up and advocating their plan of reorganization, in opposition to that of the German bondholders; and it further alleges that the English bondholders, through their agent, had advertised that their plan of reorganization had the approval of the receivers of the road and of the counsel of the trustees of the mortgage, the complainants in this suit.

It is alleged that the agent of these European bondholders applied to the trustees under the mortgage to be supplied with copies of the papers filed from time to time in the cause, and that they have not done so, and have refused so to do. And it is charged that the trustees are carrying on the suit in furtherance of the plans of the English bondholders without reference to those of the German bondholders or their committee, and the prayer is that they may be made parties to the suit.

It is nowhere alleged in this petition, original or amended, that the trustees or their counsel, so far as this suit has progressed, have not acted for the benefit of all the bondholders under the mortgage without partiality or prejudice. No single act of the trustees in the conduct of the suit is referred to as detrimental, or in antagonism to the interest of the petitioners. Nor is the court asked, on account of their negligence, fraud, or incompetency, to remove them and give to the petitioners or the bondholders the conduct of the suit.

The sole objection is that among the bondholders themselves there has arisen a dispute respecting the reorganization of the defendant company, and that the trustees or their counsel have, in consultation with such bondholders as they have had access to, given preference to the plan of one party of the bondholders rather than to that of the other.

No allegation is made, however, that this preference has been expressed in any proceedings taken in court, or that it has influenced in any way the conduct of the suit on the part of the trustees.

Of course in every cause in equity all the parties in interest must be made parties to the suit, but in the case of *Richards v. The Chesapeake and Ohio Railroad* this court has already held that to foreclose a mortgage given by a railroad company to trustees to secure the payment of bonds and coupons mentioned in it, as they mature, the trustees are the only necessary parties to the suit; that the proper parties to be defendants are the parties who hold or claim in opposition to them, is equally clear.

In order, therefore, to disturb the rights of the trustees to bring and conduct this suit, in which they represent every bondholder known to the mortgage, at the instance of such a bondholder, it

must be shown to the court that the trustees have done, or contemplate doing, in the cause some act which will be detrimental to the interest of such bondholder or set of bondholders. This is not averred or proved in the matter of this petition. It is alleged that the trustees have approved a plan of reorganization proposed by one set of bondholders rather than another. But the court cannot consider any proceedings among the bondholders or trustees which are not the subject of proceedings in this court and this cause, so that until it is proved, as it is not now asserted, that the trustees under this mortgage, ought not, by reason of negligence, fraud, or incompetency, to conduct this suit, the petitioners have no right to ask that they be appointed plaintiffs to share in such conduct, or to conduct it wholly themselves. I know of no instance in a case of foreclosure of a railroad mortgage where the trustees have been displaced or required to take an adjutant bondholder to assist in the conduct of a suit, ~~except~~ where some malfeasance or incompetency is alleged on the part of the trustee. But the petitioners ask in the petition, as amended, at once to be made parties, whether plaintiff or defendant, and cite numerous instances where the courts have allowed bondholders of different interests or classes, who, though represented by the same parties, had or thought they had, different interests to be defended or asserted, from others represented under the same mortgage or deed of trust. It seems to me none of these cases apply to the matter of this petition. There is but one class of bondholders under this mortgage. The interests of each bondholder are identical. Some of the bondholders have moved the action of the trustees and others have not. The one are active bondholders and the others are inactive. Some of them are represented by one committee and others are represented by another, but this does not constitute a class of bondholders; their interests are identical, and one might as well say that because bondholders under the same mortgage were represented in court by different counsel, that constituted them a different class of bondholders, and that they were, because represented by different persons, entitled to be parties to the suit.

The moment a petition is presented to this court by any party interested in the conduct or result of this suit, which alleges that

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Opinion of Hughes, J., dissenting.

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these trustees are derelict, incompetent, or partial in any action they propose to the court, that petition shall be, as it is entitled to be, respectfully heard, and if after consideration of the proof it shall be ascertained that the petitioner is correct the trustees will be removed, and the bondholders allowed to conduct the suit in their own way without the intervention of trustees, except so far as they may be nominal parties to it.

And these petitioners who now ask to be made parties, plaintiffs or defendants, while we refuse them the conduct of the suit or to be made parties to it, are at liberty, whenever a motion is made in this cause which in their judgment is hostile to the interests of their clients, to oppose it, as they have done in this instance, by petition; if the circumstances show bad faith on the part of the trustees, they will be removed and others appointed to conduct the suit. This serves all the purposes of this petition, except that the bondholders represented, or alleged to be represented by the signers of it, may not have the right of appeal from any decree of the court which they think unfavorable to their specific and personal interests, unless made parties to the record. Under those circumstances, when they arise, we think any bondholder who feels that his rights are injured by the action of the trustees or of the court has a right to be put in such position, either as plaintiff or defendant, as will enable him to have them adjudicated by an appellate court. That case is not presented to us by this petition, and the prayer of it is therefore in this instance refused.

Judge Hughes differed, in the following opinion:

HUGHES, J.—I have differed so seldom with the presiding judge (whose opinion is the law of the court) that it is with great reluctance that I now express a dissent from his ruling. In the result at which he arrives, in the decision just read, I concur substantially, as the petitioners can gain all they now desire, under the ruling of the court.

I think that the bondholders who did not unite in directing the trustees to move in this cause for foreclosure, may of mere right be made parties *defendant*.

In considering the petition of the Dutch bondholders, I have

been content to confine my view to the terms of the trust deed securing the bonds of the consolidated company. A provision of that deed authorizes the trustees to proceed for foreclosure at the direction of one-fifth of the bondholders secured. It thereby classifies these bondholders into those who move in the suit and those who fail or refuse to move. It has never appeared affirmatively in this cause how many of the bondholders united in instructing the trustees to proceed for foreclosure. That question, I believe, went by default at the commencement of the suit, which began (before suit was entered) with a consent order for the appointment of two receivers. This consent was afterwards withdrawn. It now appears that the holders of about two millions of the bonds are represented by the trustees; that the holders of another two millions are not in sympathy with the trustees, and are here petitioning for a standing in court with a view to looking after their own interests; and that the holders of still another million and a half of bonds are taking no part in the proceeding one way or the other. Thus the petitioners are neither actually nor presumptively complainants in this cause. Inasmuch as the trust deed itself classifies the bondholders into those by whose instructions the trustees are acting, and those who may see reason to dissent from that action; and inasmuch as actual objection to the policy of the trustees is made by the holders of the imposing amount of two millions of bonds, it seems to me that the court is bound to recognize the classification of bondholders made by the deed itself, and, of mere right, to let into the cause, in the person or persons of some authorized representative, as parties defendant, in the manner prescribed by Rule 48 in Equity, the petitioners for the Dutch bondholders.

I should prefer that this should be done, and I have no doubt the petitioners themselves would prefer it to be done, under their original petition, in which they pray to be admitted as of mere right.

This would relieve them from the necessity, which is doubtless an unpleasant one, of formally arraigning the trustees before the court for any sort of dereliction; and I suppose, if they were allowed, they would withdraw their amended petition and stand upon the mere right of being parties to the cause of the class con-

templated by the trust deed, who did not move as plaintiffs, and who are not in sympathy with the policy of the trustees. None but those bondholders who gave instructions to the trustees to proceed for foreclosure are technically or theoretically complainants in this cause; and I see no technical irregularity and no violation of the theoretical or logical proprieties of equity practice in allowing to a large class of interested persons who, under the terms of the trust deed, cannot be presumed to be represented by the trustees or to be parties complainant in this suit, either in law or fact, a standing in court, as parties defendant.

#### THE STEWART PETITION.

One of the most important questions which arose in the case was that presented by the petition of D. K. Stewart, and which is fully exhibited and discussed in the following opinion of Judge Hughes. Judge Bond differed on the law involved, but it was so desirable that a conclusion should be reached that should not involve a certificate of divided opinion to the Supreme Court, that Judge Bond requested the opinion of Chief Justice Waite, who was present when the question came on for decision. On full conference the Chief Justice concurred in opinion with Judge Hughes. Judge Bond yielded his own opinion and the decree of the court was entered on that basis, Judge Bond signing the decree along with Judge Hughes. The following opinion had been prepared by Judge Hughes before this conference, and furnishes the reasons on which his own opinion was based. It is not to be accepted as embodying the reasons of Chief Justice Waite, and of course does not express the opinions of Judge Bond.

HUGHES, J.—The two statements of agreed facts show the following case: In 1854 the Board of Directors of the Virginia and Tennessee Railroad passed a resolution authorizing the issue of stock, to be called "preferred stock," interest (not dividends) on which was agreed to be paid regularly, and was agreed to be a lien, or liability of the company, next in grade to the second mortgage bonds, and to take precedence of all indebtedness sub-

sequent to the date of the resolution. The stock was issued and bought with that understanding, but no mortgage or trust-deed was executed for the sole purpose of creating this lien. Afterwards, in 1855, the company executed a mortgage, known as the income mortgage, in which the prior lien of the interest on this stock was recognized and protected. Again, just before the execution of the mortgage to the foreign bondholders, John Collinson, their attorney in fact, issued a prospectus setting forth the debts of the company that would be superior to the said mortgage, and naming the annual interest on this stock among them.

Just after the war, in 1866, the principal of a great deal of the debts of the company became due. Crippled as it had been by the war, the company was unable to meet these obligations at the time, and consequently proceeded to fund them in new bonds at 8 per cent. interest. But for amounts under \$1000 it issued certificates bearing interest at the same rate. A great many coupons for interest past due, on the several mortgages of the road, were also funded in certificates of the same character. In no instance did the company require those who bought these certificates to waive the mortgage lien, nor did the company require them to accept these certificates in absolute *payment* of the coupons, etc., funded. In the prospectus of Mr. Collinson, mentioned above, these certificates were named as one of the debts superior in dignity to the mortgage bondholders, and the plaintiffs' trustees, by buying in a lot of them for the benefit of their *cestui que trusts*, paying in exchange therefor bonds secured by the mortgage to them, recognized their priority. The questions to be considered, therefore, are (a) whether the interest on the preferred stock ever was a lien? (b) whether, if a lien as between the original parties, the trustees and their *cestui que trusts* have had sufficient notice, actual or constructive, to make it a lien as against them? (c) whether the acceptance of these certificates operated a waiver or satisfaction of the bonds, etc., which were surrendered in exchange for them? I will consider these questions in their order.

I have no difficulty in holding that the mode in which this preferred stock was issued created a lien as between the parties thereto. They were issued with the declaration that they were a lien; they were bought on the faith of that representation. A court

of equity will raise equitable liens for the purpose of justice, and if a lien could not be created otherwise, could even make the company execute a conveyance for that purpose. But it is not necessary. A court of equity considers that as done which ought to be done in order more fully to effectuate the intention of the parties. It will, therefore, consider that as a lien which was so intended to be by the parties. And it will do so with special readiness in this instance, where it has been recognized and treated as such without dispute by all parties for more than twenty years.

I therefore pass to the consideration of the question whether it was a valid equity as against the mortgage to the plaintiffs' trustees. If they take with notice of the equity decided above to exist, they take subject to it. Of course it is not necessary that the holder of every bond secured by that mortgage shall have notice. Notice to their agents, the trustees, and John Collinson, is notice to them. I hold that not only their agents had notice, but that probably they themselves had sufficient notice at least to put them on inquiry. This notice was given (1) By the income mortgage, a deed duly executed and recorded. That deed expressly recognizes the lien and the priority of the lien of this preferred stock. It is recognized in terms which admit of no ambiguity. (2) By the prospectus issued by John Collinson, their agent. This was widely circulated, and doubtless no one bought these bonds without reading it. And actual notice given in this manner is as effective as if given in any other. (3) The 14th section of the act of incorporation of the Atlantic, Mississippi and Ohio Railroad, providing for the classification, etc., of the debts and stock of the divisional roads, was itself calculated to apprise subsequent incumbrancers of the existence of those debts, etc., and to put them on inquiry in protection of their own interests. I therefore hold that the interest on this preferred stock is a liability of the company next in dignity to the second mortgage bonds of the Virginia and Tennessee Railroad, and superior in dignity and valid against the lien created by the mortgage to the plaintiffs' trustees. Nor have I any more hesitation in deciding in favor of the priority of lien of the registered certificates. I see nothing to show that a novation was contemplated by either party. A novation can only arise in pursuance of an agreement

express or implied. A contract of such a character must be clearly proved, and the burden of proving it is on the one who alleges it. An intention on both sides to enter into such a contract must be proved.

There is no proof of such an intention in this case. That it was not intended by the company is shown by the resolution authorizing the perpetuation of the mortgage lien on the face of the certificates. And surely it cannot be held that such was the intention of those who received these certificates, when they were neither expected nor required to waive their lien. It cannot be held that they waived it voluntarily. It is well-settled law that the acceptance of different or additional evidences of debt is not a satisfaction of the former evidence or security, unless it is clearly shown to have been so intended. A debt is not paid by taking a note for it, nor is a mortgage paid by taking a certificate of indebtedness. A party may receive as many different securities for the same debt as he pleases, and the law will not hold that he waived his former securities unless it is clearly proved that he did so, and intended to do so. Those, therefore, who claim that these registered certificates were an absolute satisfaction of the mortgage lien to that extent must prove that it was so intended. There is no such proof in this case. On the contrary, everything points to the opposite conclusion. The purpose for which these certificates were issued is plain. At the time the interest or parts of the principal so funded became due, the company could not meet their payment. It wanted time, and in consideration of the time thereby granted, it increased the rate of interest, and funded interest as principal. Their consideration, therefore, was not the waiver of their lien. It was the additional time thereby granted. That, it is settled, is a sufficient legal consideration. Such funding operations are of daily occurrence. The Miller covenant was of a similar nature, and since the appointment of the receivers, in the fall of 1877, they obtained leave of court to issue somewhat similar certificates extending the time of payment of some of the divisional mortgages. Until this proceeding, these certificates have always been treated as liens. They were stated to be such by Mr. Collinson in his prospectus; they were recognized as such by the trustees them-

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selves. Unless on the supposition that these certificates were a lien superior to their own mortgage, the trustees would hardly have brought in \$40,000 of them, and surrendered in exchange for them an equal proportion of their own bonds. I, therefore, hold that their lien is not lost, and that they are of the same dignity as the interest coupons, etc., in exchange for which they were issued. Nor can I help feeling that the resistance of the prayer of their petition places the complainants in the attitude of bad faith to the petitioners.

The hearing of the foregoing matter was at the same term of the court at which a motion for a decree of foreclosure and sale was to be passed upon.

## THE VIRGINIA AND TENNESSEE COMPANY.

A petition was presented at this term by the agents and counsel of the Dutch bondholders, praying that, before entering a decree of foreclosure and sale, the complainants should be required to make the president and directors of the Virginia and Tennessee Company a party defendant. The facts upon which this petition was based appear in the following opinion of Judge Hughes on that subject, and need not be set out here. Judge Bond was opposed to the prayer of the petition on the ground that the company named was neither a necessary nor a proper party defendant to the cause. Chief Justice Waite thought that the company was not a necessary party; and so the decision of the court was against the prayer of the petition. But Judge Hughes thought the company named a necessary party, and filed the following opinion on the subject (p. 361).

## THE PETITION OF GRAHAM'S EXECUTORS ET AL.

David Graham's executors, and others, owners of \$24,800 of the OLD STOCK of the Virginia and Tennessee Railroad Company, suing for themselves and all other stockholders other than the Atlantic, Mississippi and Ohio Railroad Company (owning together about 3389 shares), petitioned the United States court

for leave to make the receivers, Charles T. Perkins and Henry Fink, parties defendant to a suit in equity, which said petitioners proposed to bring in the Circuit Court of the city of Richmond. They filed with their petition as part thereof, a copy of the proposed bill. In it they allege (among many other things) that the Atlantic, Mississippi and Ohio Railroad Company is, like themselves, *only a stockholder* in the Virginia and Tennessee Railroad Company, though owning a large majority of the stock, say 31,611 shares out of 35,000 shares, the chartered limit of the capital. They allege that the Atlantic, Mississippi and Ohio Railroad Company has never acquired in any manner, any right or title to the railroad, the property or the franchises of the Virginia and Tennessee Company, and that the possession of the same by the president and directors of the Atlantic, Mississippi and Ohio Company was an unlawful usurpation. They insist that the deed of 9th September 1871, the mortgage under which the plaintiffs claim, if valid, is operative only to convey the 31,611 shares of the capital stock of the Virginia and Tennessee Railroad Company owned and held by the Atlantic, Mississippi and Ohio Company. The proposed bill makes the plaintiffs in this suit the Board of Public Works, the Commonwealth of Virginia, the trustees in all of the Virginia and Tennessee deeds, the president and directors of the Virginia and Tennessee Railroad Company, and the VIRGINIA AND TENNESSEE RAILROAD COMPANY itself, in its corporate name and character, parties defendant, and prays relief in the State court according to the facts stated.

The argument on the petition was heard at Norfolk, on Wednesday, May 7th, 1879.

The court, composed at the time of Waite, Chief Justice, and Bond, Judge, for the purpose of passing upon this question, denied the prayer of the petitioners. The Chief Justice from the bench said in substance: That there was no reason why Graham's executors et al. should not, if so advised, bring their suit in the State court against the plaintiffs here, and against the Atlantic, Mississippi and Ohio Railroad Company, and all other parties interested, and assert therein any right they may have in the

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Petition of Graham's executors et al.

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premises. That these petitioners, not being parties here, could not be barred or affected by any proceeding or decree in this suit. That this court could only sell such estate in the premises as the Atlantic, Mississippi and Ohio Railroad Company actually owned, and by deed lawfully conveyed to the plaintiffs. That the purchaser at a sale made by this court would buy subject to all the rights of Graham's executors and others (whatever they may be), and that they, by supplemental and amended bill, might make the purchaser, whenever he came into being, a party defendant in their suit in the State court, and litigate their rights with him there. That it was neither necessary nor proper to make the receivers parties to any such contention. That they neither claim nor have any title to or interest in the subject-matter. They are merely the servants of this court; the hands with which the court preserves and manages the property *pendente lite*, and they must not be interfered with in the execution of the orders of this court.

Thereupon the said Graham's executors and others, by counsel, moved the court to permit them to appear as parties defendant in this suit, and to file their answer to the plaintiffs' original and amended and supplemental bills; and THEN to move and insist that the plaintiffs be required to amend and supplement their bills by making the Virginia and Tennessee Railroad Company a party defendant in this court.

The court denied the motion. The Chief Justice said, in substance: That the rights of Graham's executors were not compromised or put in jeopardy by these proceedings. That this court could dispose of only such estate as legally belonged to the parties of record. That if the plaintiffs, and the principal defendant, the mortgagees and the mortgagor, after being warned by these public proceedings of claims adverse to their title, were still willing to proceed to foreclosure and sale, they were at liberty to do so, if they choose to take the responsibility and run the risk. In reply to a suggestion by counsel that the purchaser might be misled and embarrassed, the Chief Justice said he did not see how that could affect Graham's executors or their rights.

After the judgment of the court was pronounced, Hughes, J.,

who was on the bench and heard the argument, though not sitting as one of the court on that question, said: that while he was of opinion that the prayer of this petition asking leave to sue in a State court should be denied, yet he thought that the Virginia and Tennessee Railroad Company, and also the Southside and Norfolk and Petersburg Railroad Companies ought all three to be made defendants. That the grantors in the several divisional deeds exhibited with the plaintiffs' bills were proper, necessary, and indispensable parties, as much so as the grantees in said deeds. That said three companies had rights affected by these proceedings, and they ought to be here to defend them. That the plaintiffs having neglected to make said companies parties, their suit was defective, and not ready for a decree of foreclosure. But inasmuch as his brothers were of a contrary opinion, and had so judicially decided, he would henceforth in this cause, as he was bound to do, consider the point as *res adjudicata*, and act accordingly.

The next day the representatives of the Dutch bondholders filed a petition, praying that the Virginia and Tennessee, Southside, and Norfolk and Petersburg Railroad Companies might be made parties, upon grounds similar to those insisted upon by Graham's executors the day before. After hearing further argument, the court (consisting of Waite, Ch. J., and Bond, J.) adhered to its decision, that the plaintiffs would not be required to make the divisional companies parties.

HUGHES, J.—Among my objections to a decree in the present status of the case is the fact that the Virginia and Tennessee Company is not a party defendant to this suit.

Various sections of the act of June, 1870, providing for the formation of the Atlantic, Mississippi and Ohio Company, contemplate expressly or impliedly the continued existence, for certain purposes, of the several original companies of which the Atlantic, Mississippi and Ohio was formed, after and notwithstanding the formation of the consolidated company. One of the sections provides that no shareholder in an original company should be required to subscribe his shares to the stock of the consolidated

company. Another section provides that the joint company shall arrange with the divisional companies for the use of their respective roads and properties upon such terms as the latter may agree to "in general meeting." Another provides that the property and franchises of the divisional companies should vest in the general company only *as and when* it shall absorb the whole of their shares respectively. Another keeps alive the divisional companies for the liquidation of their respective debts as long as the claims of their creditors and shareholders shall remain unsatisfied. Another provides that a separate account of the property, receipts, and expenses of each divisional company shall be kept, for the purpose of protecting the claims and preserving the rights of their respective creditors and shareholders until they are satisfied. In short, I gather from the whole tenor of the act of 1870, that the Legislature contemplated a continued separate existence of each divisional company, for certain important purposes, as long as any of the shares of its capital stock were not subscribed to that of the Atlantic, Mississippi and Ohio Company, and as long as any debt which it had contracted remained.

Moreover, the act of March 6th, 1872, entitled An act to complete the organization of the Atlantic, Mississippi and Ohio Company, contemplated the existence of the divisional companies subsequent to the organization of the Atlantic, Mississippi and Ohio Company, and provided a method of extinguishing them by authorizing the condemnation of their stock. It does not appear that anything has been done under the authority given by this act towards extinguishing in the manner which it provides the Virginia and Tennessee Company, and it is a fact of record that that company remains extant as a legal corporation.

But there is nothing of record to show how much of the stock of the divisional companies is outstanding; and it seems to me that this is a matter of sufficient importance to be made the subject of reference to the master commissioner. In order to know, however, with approximate accuracy the state of things in this regard, I have obtained from the secretary of the divisional companies a statement from their books of the number of shares held in them respectively, which have not been subscribed to the At-

lantic, Mississippi and Ohio Company. That number is as follows. In the

Norfolk and Petersburg Company,	.	.	43	shares.
Southside Company,	.	.	15	"
Virginia and Kentucky Company,	.	.	605	"
Virginia and Tennessee Company,	.	.	3398	"

Leaving out of consideration the three first-named companies, it seems to me that the court would not be justified in ignoring the existence of the Virginia and Tennessee Company, in which there is outstanding stock representing a capital of \$340,000. Heretofore it has been possible for the court passively to shut its eyes to the existence of this company, but it can no longer do so; for since the last hearing of this cause a petition has been presented by a portion of the shareholders of this company asking leave to file a bill in a State court (a copy of which is attached to the petition), setting out facts to show its continued existence, and not only impeaching the validity of the organization of the Atlantic, Mississippi and Ohio Company (the defendant in this suit), but attacking as fraudulent the mortgage deed for satisfying which the court is now asked to decree a sale of the railroad which belonged to the Virginia and Tennessee Company. These petitioners are holders of unextinguished stock in a company which the law expressly keeps alive in respect to its debts and to this stock to the amount of several thousands of dollars.

It is a cardinal rule in equity that all persons should be parties to a suit who have an interest in a complete decree settling the title to the subject of the suit and determining all claims upon it; that is to say, it is an imperative rule, that all should be made parties, who, if parties, would be concluded by a complete decree. Our decree in this cause, in order to be complete, must determine the amount of all debts binding the property, and must settle the title of the property as against all claimants. The object of this suit is to procure the sale of a complete title, subject only to the claims of the divisional mortgages. We are to pass a title to the purchaser good against all the world except the lien of the divisional mortgages, and we are to determine the amounts due upon

these mortgages. In order to such a decree, it is not only incumbent on us to bring all parties into the cause who have valid claims against this property, but all who have a right in law to litigate these matters, however barren of result that litigation might promise to be. We are to sell a title not only good against successful litigation, but as to which all parties in interest shall be estopped from vexatious litigation. We are not only to sell the property but to settle the title to it.

Among the debts we are ascertaining, by references to a commissioner and by solemn decree, are those of the original Virginia and Tennessee Company ; and yet that company, which as to its debts is as certainly in existence as the Atlantic, Mississippi and Ohio Company itself, is not a party to the record. We are determining the debts which it owes in order to a sale of the property which it pledged, without making it a party to the proceeding for sale.

What if we should sell to a highest bidder ignorant of the existence of the Virginia and Tennessee Company and of its relations to the railroad sold ; and what if that bidder, on hearing the facts of the case, should refuse to comply with the terms of sale because of these facts : would the court compel a compliance ? I think it might well hesitate to do so.

In the present status of this cause our decree would not conclude the Virginia and Tennessee Company or its stockholders either as to the title of the Virginia and Tennessee Railroad, or as to the amount due on its divisional mortgages.

Such a decree would have still another injurious effect. The act of Assembly of March 6th, 1872, authorizing the condemnation and extinction of the stock of the Virginia and Tennessee Company not subscribed to the Atlantic, Mississippi and Ohio Company, was entitled "An act to complete the organization of the Atlantic, Mississippi and Ohio Company." It is an act of the class which are strictly construed. It is an act of which only the Atlantic, Mississippi and Ohio Company can avail itself upon a strict construction of the language of its title, and of the terms of its fifth section. But the sale of the Virginia and Tennessee road by this court will extinguish the Atlantic, Mississippi and

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Ohio Company, as a corporation; and with its extinction will lapse the right of condemning the outstanding stock of the divisional companies given by this act of 1872. So that our decree, if given in the present stage of this suit, instead of settling the title of the property to be sold, as against the Virginia and Tennessee Company's stockholders, will keep alive that company indefinitely, with power at any time to disturb the title which we sell. Whereas, if the Virginia and Tennessee Company were made a party to the suit, it would be concluded by the decree, and the sale of its property would, by operation of law, *ipso facto* extinguish that company, as it will extinguish the Atlantic, Mississippi and Ohio Company.

FINAL DECREE OF FORECLOSURE AND FOR SALE OF THE  
PROPERTY OF DEFENDANTS.

This cause came on to be further heard at this term upon the pleadings, and upon the evidence and papers, and master's reports heretofore filed therein, and was argued by counsel; and thereupon the court, upon consideration of the premises, orders, declares, and decrees:

1. That all the reports heretofore made and filed in this cause by the master, as modified by his report, filed on the 30th day of November, 1878, be, and the same are hereby confirmed, except as overruled or modified by this decree, and that the allegations and averments in the complainants' bill of complaint, so far as they are material to the relief prayed for, are true.

2. *The court declares and decrees*, That the deed of trust executed by the Atlantic, Mississippi and Ohio Railroad Company to Francis Skiddy, William Butler Duncan, and Samuel L. M. Barlow, trustees, complainants in this action, on the 9th day of September, 1871, and of which a true copy is annexed to the master's report, filed in this cause on the 30th November, 1878, to which reference is had, is a valid conveyance of the railroad franchises and property of the said corporation therein mentioned, for the security of the mortgage bonds therein set forth; that the said bonds were duly issued, and the same and the proceeds thereof lawfully

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disposed of, and dealt with under and according to the statute of the State of Virginia, in that behalf made and provided, approved June 17th, 1870; and that the said deed of trust vested in the complainants, as trustees for the purposes therein mentioned, and according to the tenor thereof, a good and valid title to all and singular the property and franchises therein described, subject only to the liens thereon hereinafter set forth.

3. *The court declares and decrees*, That the franchises and property conveyed by the said trust deed of September 9th, 1871, to the complainants, trustees, by the Atlantic, Mississippi and Ohio Railroad Company, by way of mortgage, described as near as may be, are as follows; that is to say, all the right, title, and interest of the said Atlantic, Mississippi and Ohio Railroad Company in and to the franchises of the said company, its entire line of railroad then constructed, or thereafter to be constructed; in fact extending from Norfolk, in the State of Virginia, to Cumberland Gap, in the State of Kentucky, together with all branches of the said line of railroad then constructed, or thereafter to be constructed, with the rolls, incomes, rents, issues, and profits thereof, and all real estate, rights of way, easements, fixtures, rolling stock, machinery, tools, and equipments, and all other personal property thereto belonging; and all property, real, personal, and mixed, and all corporate powers and franchises belonging or appertaining to the said Atlantic, Mississippi and Ohio Railroad Company, then possessed by the said company, or thereafter to be acquired by the said company. And for all the purposes of this decree the inventory of the receivers may be referred to for a more full and detailed description of the mortgaged premises.

The description also includes all additions to the mortgaged property and premises made or to be made by the receivers; and also all railroad supplies which the receivers may have on hand at the time of sale, or may acquire thereafter before delivery of possession.

4. *It is further declared and decreed*, That the estate and interest of the complainants in the above-described premises, are, at the date of this decree, subject to the prior liens, stated in the master's report, and hereinafter more particularly described, and

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subject to which prior liens, to the extent that they may be outstanding at the time of sale, with interest then accrued on the sums of money secured thereby, the premises must be sold as hereinafter directed.

5. *The court declares and decrees,* That there was a default on the part of the said corporation in the payment of the instalments of interest upon the said bonds, issued under the trust deed to the complainants, due and payable according to the tenor thereof, on the 1st day of October, 1874, and on the 1st day of April, 1875, and that since the last named date no part of such interest has been paid.

That the amount of such interest which has become and remains due and payable, is at the date of this decree, the sum of \$1,932,687.75, and that no part of the principal of said bonds has become payable.

6. *The court declares and decrees,* That of the bonds issued under the trust deed to the complainants, the 474 bonds mentioned in the master's report in this cause, filed on the 30th November, 1878, as delivered to the defendant, the Atlantic, Mississippi and Ohio Railroad Company, by the plaintiffs' trustees, before the appointment of the receivers in this action, and the 5026 bonds deposited by the receivers in the Safe Deposit Company of Baltimore, and the 4030 bonds obtained by the receivers from the Union Bank of London, and deposited with the Safe Deposit Company of Baltimore, all be cancelled by the receivers, and the fact of such cancellation be reported to this court. If for any reasons they shall not cancel the whole number of these bonds, let such reasons be reported.

7. *The court declares and decrees,* That the amount of indebtedness secured by the trust deed of the Norfolk and Petersburg Railroad Company to George Blood, Jr., and John M. Southgate, dated June 15th, 1857, and bearing interest at *eight* per cent., payable semi-annually, January 1st and July 1st of each year, is \$309,500; that this indebtedness became due and payable on the 1st day of January, 1877; that under the authority of this court the receivers have, by an agreement with the holders, extended the time for the payment of \$258,500 thereof, for

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the period of ten years, from the 1st day of January, 1878, leaving a balance of such indebtedness due and payable of \$51,000.

The above amount includes two bonds of \$500 each, numbered 260 and 296, delivered to the receivers, at the time of their appointment, by the Atlantic, Mississippi and Ohio Railroad Company.

That of the amount of the indebtedness secured by the last-mentioned mortgage, bearing interest at *seven* per cent., payable semi-annually, January 1st and July 1st of each year, there was due on the 1st of January, 1877, \$181,500, of which amount the receivers have, by an agreement with the holders, extended the time for payment, under the authority heretofore conferred upon them by this court in that behalf, of \$161,000 for the period of ten years, from the first day of January, 1878, leaving of the indebtedness secured by this deed of trust, and bearing seven per cent. interest, due and unpaid, \$20,500.

The above amount includes 44 bonds of \$500 each, delivered to the receivers, at the time of their appointment, by the Atlantic, Mississippi and Ohio Railroad Company, which bonds constitute a part of the mortgaged property.

8. *The court declares and decrees*, That the amount of the indebtedness secured by the trust deed of the Norfolk and Petersburg Railroad Company, to John S. Tucker, dated September 11th, 1868, and bearing eight per cent. interest, payable semi-annually January 1st and July 1st, of each year, is \$500,000, becoming due July 1st, 1893. Included in this amount are two bonds for \$1000 each, which came into the hands of the receivers, and also 40 bonds of \$1000 each, which came into the possession of the receivers.

9. *The court declares and decrees*, That the amount of the indebtedness secured by the trust deed of the Southside Railroad Company, to W. T. Joynes, dated November 15th, 1854, is \$1400.

10. *The court declares and decrees*, That the amount of the indebtedness secured by the trust deed of the Southside Railroad Company, to George W. Bolling (now deceased) and Richard G. Pegram, dated October 19th, 1868, is \$1,870,000, of which \$709,000 bears interest at the rate of eight per cent. per annum,

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payable semi-annually, January 1st and July 1st, in each year, and becomes due and payable as follows:

\$100,000 on January 1st, . . . . .	1884
100,000 " " . . . . .	1885
100,000 " " . . . . .	1886
100,000 " " . . . . .	1887
100,000 " " . . . . .	1888
100,000 " " . . . . .	1889
109,000 " " . . . . .	1890

The bonds representing said indebtedness being known as Southside first preferred eight per cent. bonds.

Included in this sum of \$709,000 are bonds to the amount of \$56,000, to which the receivers became entitled at the date of their appointment, subject to a lien by way of pledge; but the pledgees, in the exercise of their right so to do, sold \$9000 of the said bonds, applying the proceeds towards the payment of the debt for which they were pledged, leaving \$47,000 still outstanding under pledge. This \$47,000 is made of the following bonds: numbers 145 to 149, 155 to 158, 204, 427 to 430 inclusive, 151, 207, 212, 216, 219, 222, 238, 239, 249, 251, 255, 270, 431, 298, 144, 142, 143, 277, 289, 291, 299, 300, 399, 433, 434, 444, 446, 447, 448, 450, 482, 485, 498.

And of said \$1,870,000, 621,000 bears six per cent. interest, payable semi-annually, January 1st and July 1st in each year, and becomes due and payable as follows:

\$93,000 on January 1st, . . . . .	1884
93,000 " " . . . . .	1885
93,000 " " . . . . .	1886
93,000 " " . . . . .	1887
93,000 " " . . . . .	1888
93,000 " " . . . . .	1889
63,000 " " . . . . .	1890

The bonds representing said indebtedness being known as Southside second preferred six per cent. bonds.

Included in this, \$621,000 are bonds to the amount of \$1000, which the receivers at date of their appointment received from the defendant, the Atlantic, Mississippi and Ohio Railroad Company, and bonds to the amount of \$16,700, which the receivers

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have since redeemed from pledge. This \$17,700 is made up of the following bonds: numbers 709, 710, 680, 681, 682, 683, 684, 692, 664, 678, 595, 596, 723, 491, 602, 603, 609, 610, 611, 612, 615, 597, 731, 767, 768, 769, 770, 771, 799, 888, 889, 890, 934, 964, 970, 973, 978, 1162, 1213, 1214, 1216 and 1256 to 1266 inclusive; 729 for \$500; 1239, 1234, 1238, 1329, 1330 for \$100 each.

Also, included in this \$621,000 are bonds to the amount of \$22,000, to which the receivers became entitled at the date of their appointment, and which are subject to the lien by way of pledge, hereinafter referred to, the said bonds being in numbers and amount as follows: numbers 686, 687, 688, 689, 690, 695, 696, 697, 698, 699, 701, 702, for \$500 each; 478, 479, 480, 481, 482, 489, 490, 582, 592, 703, 704, 705, 706; 1251, 1252, 1326, 1327, 1328, for \$100 each—in all, \$7,000; 619, 621, 622, 627, 630, 633, 634, 635, 637, 806, 807, 816, 820, 851, 854, 855, 879, 886, 887, 987, 988, and 1274—in all \$8000, and 587 and 593 for \$500 each.

And of said \$1,870,000, \$540,000 bears interest at six per cent., payable semi-annually, January 1st and July 1st in each year, and becomes due and payable as follows:

\$100,000 on January 1st,	.	.	.	.	1896
100,000     "     "	.	.	.	.	1897
100,000     "     "	.	.	.	.	1898
100,000     "     "	.	.	.	.	1899
140,000     "     "	.	.	.	.	1900

The bonds representing said indebtedness being known as South-side third preferred six per cent. bonds.

Included in this sum of \$540,000 are bonds to the amount of \$43,000, which the receivers at the time of their appointment received from the defendant, the Atlantic, Mississippi and Ohio Railroad Company, and bonds to the amount of \$6400, which they have since redeemed from pledge, making \$49,400, and composed of the following bonds: numbers 717 to 747 inclusive; 764, 794 to 801 inclusive; that is to say, 40 bonds for \$300 each—\$12,000; 310 bonds, numbers 992, 1007, 1037 to 1049, 1056 to 1250, 1301 to 1400 inclusive, for \$100 each—\$31,000; 64 bonds,

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numbers 1005, 1008 to 1020, 1251 to 1300 inclusive, for \$100 each—\$6400.

And also bonds to the amount of \$37,800, to which the receivers became entitled at the date of their appointment, and which are subject to the lien by way of pledge hereinafter referred to, the said bonds being in numbers as follows : 842 to 900, 759 to 762, 765 to 773, 802 to 825, 827 to 841, 786 to 790, 775 to 784.

11. *The court declares and decrees*, That the amount of the indebtedness secured by the trust deed of the Virginia and Tennessee Railroad Company to Chiswell Dabney, Odin G. Clay, and Abram S. Hewitt, dated December 24th, 1852, bearing semi-annual interest at the rate of six per cent., payable January 1st and July 1st of each year, is \$5000, now due and payable, together with the amount of funded interest secured by the deposit of coupons of bonds of this mortgage, in accordance with the indenture mentioned in the fourteenth paragraph of this decree.

12. *The court declares and decrees*, That the amount of the indebtedness secured by the trust deed of the Virginia and Tennessee Railroad Company to C. W. Purcell, C. L. Mosby, and C. R. Slaughter, dated January 5th, 1855, bearing interest at the rate of six per cent., payable semi-annually January 1st and July 1st of each year, is \$990,000, and the same falls due on the 30th of June, 1884, together with the amount of funded interest secured by the deposit of coupons of bonds of this mortgage in accordance with the indenture mentioned in the fourteenth paragraph of this decree.

Also, that the interest at the rate of six per cent. per annum, payable semi-annually on the first day of January and the first day of July of each year, due and to become due upon the preferred stock issued by the Virginia and Tennessee Railroad Company, under and by virtue of the resolution passed by the board of directors of said company the third day of August, 1854, and referred to in the mortgage, executed by said company to R. H. Maury, John O. L. Goggin, and Samuel Garland, trustees, dated the fifth day of December, 1855, constitutes a lien upon the property and franchises of said Virginia and Tennessee Railroad Company, next after the lien of the mortgage executed by said company to C. W. Purcell, C. L. Mosby, and C. R. Slaughter,

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trustees, dated the fifth day of January, 1855. And the court declares and decrees, that the amount of the preferred stock so issued is five hundred and fifty shares of the par value of \$100 per share.

13. *The court declares and decrees*, That the amount of the indebtedness secured by the trust deed of the Virginia and Tennessee Railroad Company to R. H. Maury, Richard Makim, and John Early, dated March 1st, 1866, is \$1,000,000, bearing interest at eight per cent., payable semi-annually, January 1st and July 1st of each year, and falling due March 1st, 1900, together with the amount of funded interest secured by the deposit of coupons of bonds of this mortgage in accordance with the indenture mentioned in the fourteenth paragraph of this decree.

Included in this sum are bonds to the amount of \$57,000, to which the receivers became entitled at the date of their appointment, subject to a lien by way of pledge, but the pledgees, in the exercise of their right so to do, sold \$6000 of the said bonds, applying the proceeds towards the payment of the debt for which they were pledged, leaving \$31,000 still out under pledge, and which are subject to the lien hereinafter referred to. This \$31,000 is made up of the following bonds: Numbers 891, 147, 148, 149, 150, 155, 156, 157, 158, 179, 180, 979 to 983, 841 to 850, 882 to 886.

14. *The court declares and decrees*, That the amount of the indebtedness secured by interest coupons and certificates of interest on preferred stock deposited under the indenture of the Virginia and Tennessee Railroad Company to Decatur H. Miller, dated December 1st, 1869, referred to in the master's report as constituting a lien upon that part of the mortgaged premises heretofore known as the railroad of the said Virginia and Tennessee Railroad Company, of \$267,600, heretofore bearing interest at the rate of eight per cent., payable semi-annually, January 1st and July 1st, and falling due July 1st, 1880, constitutes a lien upon the said Virginia and Tennessee Railroad to the extent of the said principal sum of \$267,600, with interest thereon at the rate of six per cent. per annum, payable semi-annually as aforesaid.

Included in this sum of \$267,600 are bonds to the amount of \$700, which the receivers at the time of their appointment re-

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ceived from the defendant, the Atlantic, Mississippi and Ohio Railroad Company, and bonds to the amount of \$5000 which they have since redeemed from pledge, making \$5700, and composed of the following bonds: number 56, for \$500; numbers 211 and 220, for \$100 each; 212 to 216, inclusive, for \$1000 each.

And also bonds to the amount of \$35,000, to which the receivers became entitled at the date of their appointment, which are subject to the lien by way of pledge hereinafter referred to, the said bonds being in numbers and amounts as follows: 217, \$1000; 204 to 211 for \$1000 each; 191 to 203, \$1000 each; 178 to 190, \$1000 each.

15. *The court declares and decrees*, That the certificates issued by the Virginia and Tennessee Railroad Company, amounting in the aggregate to \$84,190.73 in lieu of surrendered mortgage bonds and coupons, and for interest on the preferred stock referred to in the twelfth paragraph, constitute a lien upon the mortgaged premises of the same rank and nature as the bonds and coupons and the interest on the said preferred stock, for which they were given, with interest thereon at the rate of six per cent. per annum, payable semi-annually, the first day of January and the first day of July, until paid.

16. *The court declares and decrees*, That the amount due in respect of so-called interest funding notes, issued from time to time by the defendant, the Atlantic, Mississippi and Ohio Railroad Company, and secured by a deposit in trust, of the coupons and mortgage bonds, representing such interest, and which coupons still constitute a lien upon the mortgaged premises, according to the tenor of the mortgages made to secure the same, is \$134,584, bearing interest at the rate of six per cent. per annum, and due as to principal, as follows:

\$3,160	January 1st,	.	.	.	.	1877	,
131,324	" "	.	.	.	.	1879	

17. *The court declares and decrees*, That the bonds of the Norfolk and Petersburg Railroad Company, to the amount of \$40,000, hereinbefore declared to be subject to a lien thereon; the bonds of the Southside Railroad Company, to the amount of \$47,000,

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hereinbefore declared to be subject to a lien thereon ; the bonds of the same company to the amount of \$22,000, hereinbefore declared to be subject to a lien thereon ; the bonds of the same company to the amount of \$37,800, hereinbefore declared to be subject to a lien thereon ; the bonds of the Virginia and Tennessee Railroad Company to the amount of \$31,000, hereinbefore declared to be subject to a lien thereon, and the bonds of the same company to the amount of \$35,000, hereinbefore declared to be subject to a lien thereon, amounting in the aggregate to \$212,800, are subject to liens for the payment of \$143,800, less such sum as the receivers may have paid, under the authority of the court, towards the extinguishment of such lien.

18. *The court declares and decrees*, That under and in pursuance of the authority heretofore conferred upon them by the order of this court, the receivers have executed and delivered their certificates for the amount of the aforesaid indebtedness of \$143,800, to the end of protecting and preserving for the benefit and advantage of the plaintiffs, the value of the abovementioned bonds over and above the amount for which they stand pledged, as hereinbefore stated, and the certificates so made and delivered by the said receivers, will, until duly paid, constitute a lien upon the premises mortgaged to the complainants in and by the said trust deed, including the said bonds, superior to the lien of the indebtedness secured or intended to be secured thereby.

19. *The court declares and decrees*, That the bonds of the Norfolk and Petersburg Railroad Company to the amount of \$43,000; that the bonds of the Southside Railroad Company to the amount of \$4000; the bonds of the Virginia and Tennessee Railroad Company to the amount of \$488,000, and so-called registered certificates to the amount of \$40,517.38, obtained by the receivers, under the order of this court, from Messrs. Duncan, Sherman & Co., and in pursuance of the order of this court, deposited with the Safe Deposit Company of Baltimore, no longer constitute a lien under the respective trust deeds under which such bonds were issued, which can be enforced in any other manner, or to any other extent, than is in that behalf provided by the third article of the trusts, uses, and purposes expressed by the said trust deed of September 9th, 1871, to the complainants, as trus-

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tees ; that is to say, for the further security of the bonds issued under that trust deed or mortgage, and to be held by way of protection to the title of the purchasers of the property and franchises sold under and in pursuance of this decree ; to which end the said bonds, after there shall have been put thereon, if there has not been so put already, such proper indorsement restraining their assignability or negotiability, as is provided for by the said third article of said trust deed, shall be delivered over to the purchasers of said property and franchises, at the time of the delivery to them of the deed, to be held by them and their assigns, as a protection to their title in accordance with the third clause aforesaid.

20. *The court declares and decrees,* That the several trust deeds annexed to and forming part of the master's report, filed in this cause on the 30th day of November last past, are true copies of the originals thereof respectively, and that they are severally valid instruments of conveyance according to the tenor thereof.

21. *The court declares and decrees,* That the mortgage of the Southside Railroad Company to the Board of Public Works of Virginia, to secure an indebtedness to the amount of \$800,000, dated February 14th, 1853, delivered over to the president and directors of the Atlantic, Mississippi and Ohio Railroad Company, under the authority of a certain act of the General Assembly of Virginia, approved June 17th, 1870, and in pursuance of a so-called covenant of the same date, made in pursuance of the said act, between the Atlantic, Mississippi and Ohio Railroad Company and the said Board of Public Works, was by such transfer and by operation of law extinguished, and no longer constitutes a lien under the said mortgage of the 14th February, 1853.

22. *The court declares and decrees,* That the mortgage of the Virginia and Tennessee Railroad Company to the Board of Public Works of the State of Virginia, dated March 26th, 1853, made to secure an indebtedness of the said railroad company to the State of Virginia to the amount of \$1,000,000, which said mortgage was transferred to the Atlantic, Mississippi and Ohio Railroad Company, under and by virtue of the aforesaid covenant of June 17th, 1870, was extinguished by such transfer, and that the said mortgage and the said indebtedness no longer constitute

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a lien or incumbrance upon the premises in the said mortgage specified.

23. *The court declares and decrees*, That under and by virtue of the aforesaid act of the Legislature of the State of Virginia, approved June 17th, 1870, and the aforesaid covenant of the said Atlantic, Mississippi and Ohio Railroad Company, made with the Board of Public Works of the said State, and bearing date the day and year last aforesaid, there is now due to the State of Virginia the sum of \$3,992,408.87, which indebtedness constitutes a lien upon the premises next after and subordinate to the lien of the said trust deed to the complainants.

24. *The court declares and decrees*, That the mortgaged premises cannot be sold in parcels without loss and prejudice to all parties interested therein, and that the nature and situation of the property is such that the interest of all parties requires that it should be sold as an entirety.

25. *The court orders and decrees*, That the receivers in this action sell so many of the aforesaid bonds of the Norfolk and Petersburg, Southside, and Virginia and Tennessee Railroad Companies, respectively redeemed by them from pledge, as it may be necessary for them to sell, in order to raise the amount paid or to be paid by them to redeem such bonds from pledge, with interest on such sum; such sale to be made of such bonds, and at such times, and in such manner, either at private or public sale, as to the receivers may appear to be most judicious and beneficial. All of the bonds of the said last-mentioned companies respectively, not required for such sale and reimbursement, together with such bonds as were surrendered by the defendant company to the receivers at the time of their appointment, as hereinbefore found and stated, the receivers are directed to cancel, and to report such cancellation to the court.

26. *The court orders and decrees*, That the defendant Board of Public Works, or the defendant the State of Virginia, pay into the registry of this court, on or before the second Tuesday of January next, the amount of the debt ascertained and hereinbefore declared to be due from the defendant company to the complainants' trustees, and such further sum as may become due in the meantime for interest upon the bonds secured by the deed

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of trust to the complainants, and that, in default thereof, the said Board of Public Works and the State of Virginia shall be forever barred and foreclosed of and from all claim, lien, and equity of redemption, of, in or to, the property and franchises embraced in or covered by the said trust deed of September 9th, 1871, from the Atlantic, Mississippi and Ohio Railroad Company, to the complainants as trustees hereinafter decreed to be sold.

27. *The court further orders and decrees*, That the defendant, the Atlantic, Mississippi and Ohio Railroad Company, pay into the registry of this court on or before the second Tuesday of January next, the amount ascertained and herein declared to be due by the said company to the complainants, under the said deed of trust, together with the costs in this cause.

28. *The court further orders and decrees*, That in the event of such payment and redemption as above provided for on the part of the defendant, the Atlantic, Mississippi and Ohio Railroad Company, or on the part of the State of Virginia, or the Board of Public Works, this cause stands continued, with leave to the complainants to apply for appropriate relief in the event of any subsequent default in the payment of interest, and that in the meantime all proceedings therein be stayed.

29. *The court further orders and decrees*, That all and singular the property and franchises of every kind described in the third paragraph of this decree be sold by a master hereafter to be specially appointed for that purpose (unless payment be made by the said Board of Public Works, the State of Virginia, or the defendant company, as hereinbefore provided), subject to the amount of the prior liens and incumbrances found and stated in the fourth paragraph of this decree, as the same may exist at the time of sale, and subject also to all executory contracts made by the receivers under the authority of the court, of which the receivers are directed to give to the master, on his request, a full and accurate statement, which contracts, if any, must be publicly announced by the master at the time of sale, and subject, also, to any liability that may be thereafter established against the receivers growing out of any lawful acts done by them in their capacity of receivers, and such liabilities, if any, will remain a lien upon the premises until discharged.

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Such sale (unless stayed by such payment as provided for in the 26th and 27th paragraphs of this decree) shall be made at some convenient place in the city of Richmond, to be designated by the master. The master shall give notice of the time and place of sale by an advertisement thereof, to be inserted once in each week, for not less than ninety days before the sale in a newspaper published in each of the cities of Norfolk, Petersburg, Lynchburg, Richmond, and Goodson, in the State of Virginia, and in the city of Baltimore, in the State of Maryland; in the city of Philadelphia, in the State of Pennsylvania; in the city of New York, in the State of New York; in the city of Boston, in the State of Massachusetts; in the city of London, England; and once in each month for the same period in one published in each of the cities of Amsterdam and Groningen, in the kingdom of the Netherlands.

The master shall also serve written notice, to the like effect, upon the Attorney-General of the State of Virginia, and the Board of Public Works of the said State, at least ninety days before the sale.

The master shall sell the premises herein directed to be sold to the highest and best bidder, and he shall require such bidder, before making an adjudication to him, to pay in cash the sum of \$100,000, and if the sale is confirmed by the court, the balance of the purchase-money must be paid within thirty days; but the purchaser shall have the right to anticipate the day of payment. After the payment by the purchaser of such sum in cash as may be sufficient to pay the costs, charges, and expenses of the complainants' trust and of this cause, and the indebtedness of the receivers, and for the payment of the *pro rata* dividend out of the net proceeds of sale for distribution that may be due to other beneficiaries under the said trust deed, the master may receive from the purchaser in part payment of the purchase-money such interest coupons as may have become due and payable of the bonds secured by the said deed of trust to the complainants, at such rate per centum of the par value thereof as the purchaser would otherwise be entitled to be paid in cash in respect thereof out of the net proceeds of the sale on distribution thereof among the holders of such coupons, and the percentage so applied in

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satisfaction of the purchase-money shall be treated as a payment of such coupons to the extent of such application.

If any question shall arise as to the proportion of the purchase-money that must be paid in cash and the proportion thereof that may be paid in such coupons, application may be made to the court.

In case of the failure of any bidder to comply with the terms of sale that are to be complied with on the day of sale, and before a final adjudication to the bidder, the master may reject the bid, and proceed at once, then and there, to make a resale, or he may then and there publicly announce that on some other day, to be then designated, and between certain hours of the day to be designated, he will, at the same place, make a sale of premises under the decree without further advertisement, and he may make the same accordingly. And the master shall have power to adjourn the sale from time to time in like manner for good cause, until a sale shall have been made in accordance with the provisions of this decree.

In case of any such adjournment or adjournments, public notice thereof shall be given by publishing a note to the advertisement of sale to that effect, omitting, however, newspapers published in Europe.

30. *The court further orders and decrees,* That the master report the sale and proceedings under this decree to this court with all convenient speed, and give notice thereof to the complainants' solicitors, and the complainants' solicitors may present the said report to this court on thirty days' notice to the purchaser and the defendants' solicitors. If on presentation and consideration of the said report of sale, which shall be at a stated or special term, sitting in open court, the court shall confirm the sale, the complainants' solicitor must forthwith prepare and submit to the court a draft deed of conveyance from the master to the purchaser; and upon the settlement of the form thereof, and upon due compliance with the terms of sale by the purchaser, the master must execute and deliver such deed of conveyance to the purchaser, and the purchaser, or his successor or successors in interest, will then and thereupon be let into possession of the premises. The purchaser will also and at the same time, be en-

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titled to receive all books, maps, plans, papers, records, and documents of the defendant company, of the said several divisional companies, and relating to all extensions or branch roads of the said companies, and of the receivers, relating and appertaining to the franchises and property in question, and will likewise be entitled to receive, by way of further protection to the title, a transfer of all shares of the capital stock of the Norfolk and Petersburg Railroad Company, the Southside Railroad Company, the Virginia and Tennessee Railroad Company, and the Virginia and Kentucky Railroad Company, respectively, which were owned or held by the Atlantic, Mississippi and Ohio Railroad Company at the time of the filing of the original bill of complaint herein, and the Atlantic, Mississippi and Ohio Railroad Company is hereby directed to transfer over such shares of stock accordingly, and said purchaser will likewise be entitled to receive, by way of further protection to the title, the bonds mentioned in the nineteenth paragraph of this decree; *and it is further adjudged and decreed*, that by the sale and conveyance to be made as aforesaid of the property and franchises hereinbefore decreed to be sold by said master, the defendants in this action, and each and every of them, including the State of Virginia and the Board of Public Works of said State, and all persons claiming under them, or any of them, subsequently to the commencement of this action, shall be absolutely and forever barred and foreclosed of and from all estate, right, lien, claim, and equity of redemption of, in, or to, or in respect of, said property and franchises so sold and conveyed, and each and every part thereof.

31. *The court further orders and decrees*, That the receivers remain in possession of the mortgaged premises, and continue to operate the line of railroad after the sale, and until the conveyance thereof. They will keep a correct account of the earnings and income of the premises accruing after the date of sale, and if the sale should be confirmed, the purchaser, on delivery of possession by the receivers, will be entitled to receive the net income and earnings accruing subsequent to the date of sale, and the proceeds of such income and earnings.

32. *The court further orders and decrees*, That the master deposit all moneys coming into his hands under this decree, im-

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mediately upon the receipt thereof, in the Planters' National Bank of Richmond, Virginia, to the credit of this cause, to be paid out only in pursuance of the order of this court, and on the motion of, or on notice to, the complainants' solicitors.

If the sale shall not be confirmed by the court, the amount of purchase-money paid by the purchaser to be refunded without deduction, unless the non-confirmation thereof shall be due to the fault of the purchaser, in which event such terms will be imposed as the court may think just and proper.

33. *The court further orders and decrees*, That the proceeds of sale shall be distributed as follows, that is to say :

I. To the payment of the costs and expenses of this cause, and of the execution of the trust on the part of the complainants, and all such fees to counsel as may hereafter be allowed and directed to be paid, and of all the indebtedness of the receivers.

II. To the payment of the interest coupons, under the mortgage to the complainants, that have become due and payable, and that may become due and payable before the day of sale, and that in computing the sum due in respect of such coupons, interest may be computed thereon, and in case the proceeds of sale shall be insufficient to pay such coupons in full, the same must be paid *pro rata* and without preference. Such interest coupons must be presented to the master for payment, who will be authorized to pay the same, in whole or in part, as the case may be, when the amount of the proceeds of sale, applicable to such payment, shall have been ascertained. Any surplus that may remain, after the payment of such interest coupons as aforesaid, will remain subject to the further order of the court, and all questions touching such surplus, and the distribution thereof, are reserved.

34. *The court further orders and decrees*, That all equities among the parties to this suit, all questions of cost, expenses, and allowances, and fees of counsel, and all other questions not disposed of, or specially reserved in the foregoing decree, but properly arising under the same, or as proper subjects for further directions, are reserved.

HUGH L. BOND.  
Ro. W. HUGHES.

NORFOLK, VA., 9th May, 1879.

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Statement of the case.

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*United States Circuit Court, for the Western District of Virginia,  
at Abingdon, June 2d, 1878.*

A. H. DORR *v.* GIBBONEY'S EXECUTRIX ET AL.

On a deed of assignment to a trustee to secure creditors whose debts were all ascertained and who were marshalled by the deed into four classes, a bill in chancery was brought by one of the fourth class against the trustee's executrix for a breach of trust by the trustee. *Held,*

1. That it was not necessary to make the other creditors parties to the suit.
2. That at all events it was too late to make such an objection at the hearing.
3. That payment of the debt, by the trustee, to a receiver under a decree of confiscation of a Confederate court, was a breach of trust as against a loyal citizen.
4. That a decree in an attachment case instituted during the war by seizure of the property and publication of notice, was void as against a loyal citizen and could be impeached even collaterally.
5. That an appearance, after such a decree was rendered, for the mere purpose of moving to strike the case from the docket on the ground that no process had been served, was not such an appearance as waived previous defects in the service, and could not have the retroactive effect of validating a decree totally void.

In equity.

In 1859 Thomas L. Preston made to Robert Gibboney as trustee a deed of assignment to secure his creditors. The deed marshalled the debts into four classes and directed that they should be paid in that order of priority. Among the debts mentioned in the fourth class was "a debt due by negotiable note to A. H. Dorr (a citizen of New York) of \$2650." In 1862 the trustee sold to W. A. Stuart, G. W. Palmer, and G. B. Parker, a great part of the property conveyed for \$425,000, an amount sufficient to pay all the debts mentioned. It was stipulated that in case any of the creditors did not accept payment in Confederate currency, the purchasers should substitute their notes for such debts until they could be paid. In 1861 this debt was confiscated by John W. Johnston, receiver of the Confederate government, and paid to him by Gibboney, on the decree obtained in August, 1862. But in the meanwhile one Philip Rohr had sued out a process of foreign attachment against Dorr and served

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it upon Gibboney, accompanying it also by publication of notice, dated August 9th, 1862. A decree was rendered in his case after the war, but there was no renewed order of publication. In 1862, however, the money was loaned by John W. Johnston, receiver, to Philip Rohr. In 1873, Gibboney having died in the meanwhile, Dorr brought suit against his executrix, making parties Thomas L. Preston, Stuart, Palmer, and others, but not making any of the other creditors parties. No demurrer or plea was filed on this ground. The answer, which was not filed for some time, relied on the payment under the decree of confiscation and also on the decree in the attachment case, claiming that this decree could not be collaterally impeached. At the hearing the point was also made that the other creditors should be parties. Dorr, by his counsel, had appeared in the State court, where the attachment case of Rohr had been decided, and moved to strike the case from the docket. It was insisted by the defendants that this was such an appearance as to waive the objection to the defect of summons.

James H. Gilmore and Robert M. Hughes, for the complainant, cited *Charleston Gas Light Company v. Perdicaris*, 1 Hughes, 69 (affirmed on appeal in 6 Otto, 193); *Shortridge v. Macon*, Chase's Dec. 136; *Williams v. Bruffey*, 6 Otto, 176; *Dean v. Nelson*, 10 Wallace, 172; *Ludlow v. Ramsey*, 11 Wallace, 581; *Lasere v. Rochereau*, 17 Wallace, 438; *Earle v. McVeigh*, 1 Otto, 503; Powell on Appellate Proceedings, 106, 119, 134 *et seq.*; *D'Arcy v. Ketchum*, 11 How. 165; *Webster v. Reid*, Id. 437; *Fairfax v. Alexandria*, 28 Grat. 34; *Cuyler v. Ferrall*, 8 Am. L. Reg. 108; *Fretz v. Stover*, 22 Wallace, 198.

Joseph W. Caldwell, for Gibboney's executrix, and Johnston and Trigg, for Stuart and Palmer, cited *Lancaster v. Wilson*, 27 Grat. 427; *Voorhees v. Bank of United States*, 10 Pet. 449; *Walden v. Craig*, 14 Pet. 154; *Cooper v. Reynolds*, 10 Wallace, 308; *Pennoyer v. Neff*, 5 Otto, 714.

The following was the decision of the court:

RIVES, J.—Before entering on the examination of this case, it is necessary to dispose of the objection made to the hearing for want of proper parties to the bill. At this stage of the proceed-

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ings, such an objection cannot be heard unless for defect of parties; the court should be disabled from passing on the very right of the cause. If, however, the objection had come at an earlier stage by way of a preliminary demurrer, it could scarcely avail. There is here no community of property or interest between the complainant and the other *cestui que trust* under the deed, in the subject of his claim; his is a separate ascertained demand, wholly unconnected with any general question of the administration of the trust fund, and it is hard to conceive how the other creditors could be interested in his recovery, not from the general fund, but from the trustee, whom he seeks to hold liable on account of the actual receipt thereof. This case, therefore, falls under the exceptions to the general rule so well defined in Story's Equity Pleadings, section 207 *a* and 212. The complainant has his fixed share of the trust fund, and there can be no necessity, on the ground of principle or authority, to make any other parties than those he has already made to his complaint.

His debt is secured by the general trust deed of Thomas L. Preston of the 7th July, 1859, and is included in the *fourth* class under the designation of "a debt due by negotiable note to A. H. Dorr of \$2650." The bulk of this trust property, consisting of the Preston salt works estate, and the lands contiguous thereto, and certain interests in the King's salt works, with the appurtenant lands, were sold on the 10th day of June, 1862, by the trustee, Robert Gibboney, to W. Alexander Stuart, George W. Palmer, and George B. Parker, for the sum of \$424,000. This contract having been made during the rebellion, it was contemplated by the parties to this contract that the trustee would not be able to pay off the creditors with the currency of that belligerent era; and hence it was expressly stipulated by the purchasers, that in case of the refusal of creditors to receive such currency in payment, they were to substitute their notes for the amount so refused, secured, to the satisfaction of said Gibboney, in equal instalments, payable in one, two, three, four, and five years, from the first of July then next ensuing, or sooner, at the election of said purchasers, with interest from said first of July, and on the whole amount, payable annually.

In this state of facts, on the 22d October, 1861, the trustee,

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Robert Gibboney, was served with interrogatories from John W. Johnston, receiver of the Confederate States, acting under the sequestration act of that government, of the preceding May, and, without delay, on the very day of service, made return of this debt to Dorr, as *a citizen of New York*. Thereupon the said receiver, suing in the name of said Confederate States, procured a decree of sequestration in the District Court of the Confederate States for the Western District of Virginia, on the first day of August, 1862, of this particular debt. But inasmuch as Gibboney, in his surrender of this claim, stated that it had been attached in his hands by Philip Rohr, this decree of sequestration recites that fact, and the willingness of Gibboney to pay to the proper person; and then directs him to pay it, with accrued interest, to said receiver, John W. Johnston, with this added provision, that said Johnston should lend it on good security, or if unable to do so, invest the same in eight per cent. Confederate bonds or seven  $\frac{30}{100}$  per cent. Treasury notes, to await the decision of the suit brought by said Rohr against said Dorr. Accordingly, on the very day of this decree, we find among the vouchers of Gibboney, trustee, as aforesaid, in the record of *Preston v. Stuart, Palmer, et als.*, made an exhibit in this cause, p. 140, the following receipt:

\$3137.15. Received of Robert Gibboney, trustee of Thomas L. Preston, three thousand one hundred and thirty-seven dollars and fifteen cents, paid me under the within decree (*Confederate States, by J. W. Johnston, receiver, v. R. Gibboney, trustee, etc.*)

JOHN W. JOHNSTON,

August 1, 1862.

Receiver.

And in the Rohr Record, p. 26, we find the bond of Philip Rohr, etc., to John W. Johnston, receiver, under an order of the Confederate States District Court in the case against Robert Gibboney, trustee for Thomas L. Preston, to sequester the estate of A. H. Dorr, for the same identical sum of \$3137.15. In the settled account of said Gibboney, we find he credits himself by the same amount "paid John W. Johnston, receiver." So far, then, as Gibboney is concerned, his defence rests on the sequestration alone. He does not hold the fund subject to the attachment of Rohr. He is content with the protection and authority of the Confeder-

ate tribunal, and parts with the fund to its receiver, leaving the court to preserve the fund for the satisfaction of the attaching creditor in its own way.

Was not this conduct under the circumstances a breach of trust, for which the trustee should be held liable? It has been seen that he was under no obligation to receive the currency of that day, where it could not be paid to the creditors; on the contrary, he stipulated for its refusal, and the substitution of *time* notes in its stead. We have shown that he knew Dorr was a non-resident; a citizen of New York; and that he could not satisfy his debt with Confederate notes. Why, then, did he agree to take them? Why did he not avail of his own stipulation for such a case by taking the bond of the purchasers for such a period as would probably cover the duration of the revolt? It is only to be deemed a shift, in flagrant disregard of his duty to his non-resident *cestui que trust*, to accommodate the purchasers, to expedite his administration of the trust, and signalize his obeisance to the rebel authorities. He must have known and felt that creditors in the loyal States could not be paid in Confederate notes. This principle, as laid down by the Supreme Court in the case of *Fretz v. Stover*, 22 Wallace, 198, must have commended itself to men of ordinary sense, and least versed in business or commerce, even during hostilities. I cannot, therefore, but regard the taking of this depreciated currency as evidence of a purpose to betray the creditor in the State of New York, while the trustee was thereby to gain credit for his zeal in the Confederate cause, and his alacrity in obeying the sequestration act of the Confederate Congress. But above and beyond this consideration, is the absolute nullity of these sequestration proceedings. They depended for their validity upon the success of the rebellion. With its suppression, they perished; and to respect them now would be inconsistent with the rightful pretensions of the government and the actual results of the war. They are nullities. They are not to be respected by any court, State or Federal. I have had repeated occasions to pass upon them in this circuit; and have never hesitated in this view of them, before I could be guided by decisions in the last resort. Since then, we have the case of the *Charleston Gas Light Company v. Perdicaris*, 1 Hughes, 69, approved by the Supreme

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Court; and the recent case of *Williams v. Bruffy*, decided by the Supreme Court on error from our own Court of Appeals, and reported in Law and Equity Reporter for April, 1878, p. 481.

This position is virtually conceded in argument by the counsel for the defendants. But they seek to escape its force by sheltering themselves under the attachment suit of Philip Rohr, of which profert is made in the answer of Gibboney's Executrix. They rely upon the judgment in that case, as conclusive upon the complainant here.

How far judgments may be collaterally assailed, has been settled by elementary writers and a long course of decisions in the Supreme Court of the United States, and the appellate courts of the several States. Where the jurisdiction is conceded, errors or irregularities in proceedings conducting to the judgment, are subjects for correction by appeal or otherwise, and can never be used to assail or impeach collaterally such judgment. But where jurisdiction is lacking, either over the person or property, the judgment is void, and has no sanction or validity in any court that has to pass upon it, though collaterally. There must, therefore, be some *jurisdictional* defect in the judgment to authorize or justify its impeachment in a collateral suit. Thus, in a suit *in personam*, it is held there can be no jurisdiction save by service of the process on the defendant, or by his personal appearance. This is said to rest on a principle of natural justice, and to constitute that due process of law required by the Fourteenth Amendment of the Federal Constitution. And although the law of the State may authorize a substituted service by publication where the non-resident has property in the State that can be subsequently taken on execution upon the judgment to be obtained upon such published summons, yet if the seizure of such property is not the primary object of the suit, it is to be deemed a personal judgment and without validity if it be rendered by a State court in an action upon a money demand against a non-resident of the State, who was served by publication of summons, but upon whom no personal service of process within the State was made, and who did not appear. *Pennoyer v. Neff*, 5 Otto, 714.

But it is otherwise where the proceeding is *in rem*. The ju-

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risdiction, there rests on the duty and right of the State to protect its citizens in their contracts with non-residents, and to control the estate of the latter within its territorial limits. A seizure of the property under the laws of the State, and in the mode prescribed by them, is a species of notice to the non-resident or his agent, and extends only to the property seized. The judgment in such cases of attachment, though personal in terms, extends only to the property, and if not satisfied by it, cannot be availed of, in any way or in any court, to recover the deficiency; but to the extent of that deficiency is wholly void. *Cooper v. Reynolds*, 10 Wallace, 308. But the fundamental requisites of such jurisdiction must be sought in the terms of the statute. I will not deny that in such cases the State might prescribe the seizure alone as the ground of jurisdiction, but it is certainly more consonant with natural justice to give the party the benefit of a published summons. Hence, so universal is the legislative sense of fairness, and the desire to protect person and property from any judicial action, of which the best practical notice was not given, that in the attachment laws of the States, so far as I have any knowledge, particular provision is made to couple with the seizure a publication of summons. This mode of proceeding is in derogation of the common law; and it is a credit to our systems of jurisprudence that they adopt every practicable precaution to avoid shocking the common sense of justice, and impairing the sanctity of judicial sentences by insuring to absent parties the opportunity of being heard in defence of their rights of property as well as of person. No man's property should be taken from him and given to another unless by lawful authority, lawfully pursued, and the duty of guarding an absent one against the unlawful seizure and transfer of his property, without his knowledge, is more sacred and more consonant with the maxims of law and the dictates of justice than that of insuring to the resident citizen the fruits of his contracts with the absent owners of property that may be justly made liable to his claims. *Drake on Attachments*, 4th ed., note to sec. 89 a.

This State has reflected in its statute this sentiment of enlightened jurisprudence. It does not exact of the absent defendant what might be termed the *summum jus* of its territorial

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jurisdiction and sovereignty. It does not predicate its jurisdictional right of the seizure alone, but requires, as a prerequisite, an order of publication. Code of Virginia, 1873, p. 1014, sec. 20. In every case of attachment in this State, then, two fundamental facts must appear to give jurisdiction. First, the seizure; secondly, the order of publication. The one will not do without the other. Both must concur to give validity to the judgment, otherwise it is void.

The sufficiency and regularity of the seizure in this case is beyond dispute, and is not in controversy. But the objection lies to the order of publication, of which affidavit is duly made under date of the 9th of August, 1862. The publication was, therefore, made during the war, when all intercourse or correspondence between the citizens of the belligerent States was interdicted. Dorr could not lawfully have received it, and if he had done so surreptitiously, he could not have obeyed the summons, and repaired to his defence before an insurrectionary tribunal. The question, therefore, arises whether a publication under such circumstances fulfils the requirements or intentions of the law. Had these transactions transpired in a time of peace, there can be no doubt of the validity of this judgment. But a publication *flagrante bello*, purporting to be notice to a citizen of a belligerent state, is, in the language of Justice Bradley, delivering the opinion of the court in *Dean v. Nelson*, 10 Wallace, 172, "A mere *idle form*; the party could not lawfully see or obey it." I would add further, it is a mockery of justice. To the same effect are the subsequent cases of *Ludlow v. Ramsey*, 11 Wallace, 581; *Lasere v. Rochereau*, 17 Wallace, 438, and *Earle v. McVeigh*, 1 Otto, 503. Under these decisions I am constrained to regard the publication of the summons at that time and under the circumstances as a nullity. There is, therefore, in my view a jurisdictional defect in these proceedings by attachment, which renders the judgment void.

But in the argument of this cause a fuller record of the Rohr attachment was submitted, whereby it appeared that long after the rendition of this judgment, to wit, at the January Term, 1874, "came A. H. Dorr, by counsel, and asked leave of the court to make a motion to strike this cause from the docket, which is

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granted him, and thereupon he moved the court to strike this cause from the docket for the reason that the said Dorr had no notice of the commencement of said proceedings, and for this reason they were null and void, because from the pleadings it appears that said Dorr was a citizen of the State of New York at the time of the institution of this suit." It is now claimed that this was an appearance of the defendant, superseding the necessity of summons or publication. But if regarded as an appearance at all it is subsequent to the judgment and cannot be now invoked to impart validity to an anterior judgment, otherwise void.

Besides, such motion by counsel for defendant cannot rightfully be construed as an appearance of the defendant in ratification or approval of illegal proceedings against him. On the contrary, if an appearance at all, it is by way of protest against the judgment, and cannot under any circumstances impart by retroaction a validity to it, which it did not originally possess.

This course of reasoning conducts me to the conclusion that the judgment in Rohr's attachment suit was void, and of no obligation upon the complainant in this cause; and especially that it cannot be availed of by the executrix of Robert Gibboney to shield his estate for his accountability by reason of his illegal acceptance of Confederate notes in satisfaction of Dorr's debt, and of the nullity of his transaction with the Confederate receiver, John W. Johnston. His estate in the hands of his executrix is primarily liable to the complainant; but if it should prove insolvent, the plaintiff, on the authority of *Fretz v. Stover*, heretofore cited, has not lost his recourse against the original debtor, Thomas L. Preston, or his trust estate. But, in no event can the defendants, Palmer, Stuart & Co. be held responsible; they were absolved by Gibboney, and cannot be deprived of the acquittance he gave them and had the right to give them.

The plaintiff, therefore, must be decreed his debt and costs against Gibboney's executrix, and the cross-bill must be dismissed with costs.

Statement of the case.

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*United States Circuit Court, Western District of Virginia, at  
Abingdon, June 3d, 1879.*

CLARK, DODGE & Co. v. GIBBONEY'S EXECUTRIX ET AL.

In a suit brought to enforce payment of a debt secured by an assignment out of a trustee's estate on the ground of breach of trust. *Held,*

1. That a former suit is invalid as a plea of *res judicata*, unless the record shows that the same subject-matter was involved and the same questions raised, or so involved in the main object of the controversy as to spring necessarily therefrom.
2. That a suit on the note secured by an assignment, never prosecuted to final judgment, is not a waiver of the benefit of the assignment.
3. That payment of a debt by a trustee to a receiver under a confiscation decree of a Confederate court is a breach of trust for which the estate of the trustee is liable.

In equity.

The general facts of this case are the same as those in the preceding case of *Dorr v. Gibboney's Executrix*, except that there was no attachment suit in this case. Besides this, Clark, Dodge & Co. had brought suit on the note, but had never prosecuted it to final judgment, and it had been dismissed at the beginning of the war. The defendants claimed that this was a waiver of the benefit of the assignment. They also filed the record in the case of *Preston v. Stuart & Palmer* (reported in 29 Grat. 289), in which case Clark, Dodge & Co. had been made nominal parties defendant and attempted to use it as a plea of *res judicata*. These were the only additional questions raised.

James H. Gilmore and Robert M. Hughes, for the complainant, cited *N. E. Bank v. Lewis*, 8 Pick. 113; *Coverdale v. Wilder*, 17 Pick. 438; *Skipwith v. Cunningham*, 8 Leigh, 271; *Clark v. Ward*, 12 Grat. 440.

*Joseph W. Caldwell, for Gibboney's Executrix.*

*Johnston and Trigg, for Stuart & Palmer.*

The following is the opinion of the court:

## Opinion of the court.

RIVES, J.—An estoppel by a former adjudication is pleaded in bar of this suit. It is alleged that this adjudication was had in the suit of *Preston v. Gibboney, Trustee, etc.*, to which these complainants were nominally defendants. These complainants were parties, because secured by the assignment of 7th July, 1859; but no question was thereon raised or could have been adjudicated under the allegations of the bill as to the claim now preferred by the complainants. This suit was because of alleged frauds of the trustee constituting grounds on which his acts were assailed; and his sale to Palmer, Stuart & Parker of 10th June, 1862, under and by virtue of said assignment, was specially sought to be rescinded. Instead of the object of this suit being involved in the former, and barred thereby, it actually grows out of it, and is wholly consistent with its pretensions. Reference is had to this suit of Preston's for the evidence thereby afforded of the credit taken to himself for the payment of this debt by Gibboney, the trustee. With the main purpose of the controversy between Preston and his trustee, and the purchasers from the trustee, these plaintiffs had no connection; their claim is outside of that suit; in no wise conflicting with it; but, on the contrary, consistent therewith, and based thereon. An inspection of that voluminous record, is sufficient to show the inapplicability and invalidity of this estoppel; so this plea, if not already received, should be overruled, or otherwise refused.

For yet a stronger reason, the *ex parte* settlement of accounts by the trustee is no bar to a recovery in this case.

The creditors in this suit need not to have assented to this assignment for their benefit. Their assent will be presumed. They can now be only deprived of it by some act of theirs so clearly inconsistent therewith as to constitute a waiver of it. The depositions of William Gibboney and his counsel are relied on as express waivers. They prove only an instruction of the creditors to their agent and counsel to sue for and press the collection of their debt at law; and not to wait upon the execution of the assignment for their benefit. This they had a perfect right to do; they were not restricted to the deed, and did not lose the benefit thereof by a resort to a suit on this note. They could concurrently proceed with both remedies. It is only when the creditor

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does some act or takes some step clearly indicating an abandonment of the deed for his protection, that he will be taken as waiving it. This doctrine of waiver is a reasonable one; and is not applicable to the state of facts relied on by the executrix of Gibboney. This suit, and its dismissal under the circumstances of this case, cannot be tortured by any ingenuity into a renunciation of the benefits of this assignment.

The disposal of these preliminary objections to a recovery in this case brings us to the consideration of the merits of the controversy. It seems now conceded in the argument that the plaintiffs cannot be affected by the judicial sequestration of their debt. It was a nullity, and must be so regarded by this court upon reason and authority. Such a belligerent act is in its nature *contingent*; it must depend upon the success of the rebellion, in whose behalf it was enacted, and it must perish with the victory of the nation over its rebellious subjects. The question, then, reverts to one of liability as between the defendants to the original bill. To settle this the cross-bill was allowed; and under that, and the answers and pleading thereto, will this question be now considered and determined.

It is conceded that this debt, thus illegally discharged and sequestrated, was the debt of the defendant Preston. He, however, had provided for it by his deed of assignment of 7th July, 1859. Gibboney united in that deed, and thereby undertook its execution. In pursuance thereof he chose to receive payment thereof, and take credit on his account of the trust estate therefor. Was not this an acquittal of the grantor? Can the credit inure to the trustee, and as between grantor and trustee be allowed to the latter, and still be claimed, as between them, of the grantor as a subsisting demand upon him? Surely not; he cannot have this credit and claim against it at the same time; the act of taking the credit in his settlement with the grantor acquits and discharges the latter, and the trustee cannot be allowed to repudiate his act when he has received the benefit of it. As between Preston and Gibboney the matter is finally and definitely settled; but otherwise as between these two and the creditors; but in consideration of the equities between the two former, the creditor's resort should be *primary* against Gibboney and *secondary* against Pres-

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ton in the event of Gibboney's insolvency. This view, doubtless, accounts for the failure of the defendant Preston to answer. He thus confesses his eventual liability, and doubtless has no fear of it.

The liability of Palmer & Stuart rests upon the mistaken declaration that they had assumed to pay such debts as were to be postponed because of the refusal to receive currency. There was no such understanding on their part. The provision is quite different, and is as follows :

It is further agreed and distinctly understood that in the event said Gibboney shall be unable to pay off the creditors of said Thomas L. Preston with the funds paid by said purchasers, in consequence of the refusal of said creditors or any of them to receive the money in payment, that then the said parties of the second part shall substitute their notes for the amount so refused, secured to the satisfaction of said Gibboney in notes, for equal instalments, payable in 1, 2, 3, 4, and 5 years from first July next, or sooner if the parties of the second part shall elect so to do, with interest on same from first July next, and interest on whole amount, payable annually.

It is clear from this quotation, therefore, that so far from its being true, as alleged, that these purchasers agreed to pay these deferred debts, it was incumbent on Gibboney, when unable to use current funds, to defer the payment through five years, if agreeable to the purchasers, so as to secure for such creditors a satisfactory medium of payment. Neither was there any obligation on the part of the vendees to see to the application of the purchase-money. The effect of the deed of assignment was to interpose for the discharge of the debts secured, a trustee whose acquittance or receipt should be all that the purchasers could require to discharge them of liability. It would be, therefore, to defeat the plain provisions of the assignment, and its manifest intent to deny Palmer & Stuart in this case the protection of the trustee's receipt for this debt, and his acquittance therefor. I cannot, therefore, think that they can in any event be held liable for the malversation of the trustee in turning over this debt to the hands of the Confederate receiver.

Singular infidelity attended the agencies employed by these foreign creditors. One of their attorneys was William Gibboney, also a Confederate receiver, who, as his deposition shows, claimed

## Opinion of the court.

this fund, and apparently gave up his claim upon the allowance of his commission of \$120.85, being five per cent. on the amount of \$2417 paid receiver Johnston, and upon the receipt of liberal fees by him and his associate. Truly, it might be said of this transaction, it was verily "*quasi agnum committere lupo.*"

To ascertain the liability of Gibboney, let us reproduce the credit he takes to himself in his settlement of accounts in the Preston suit against him. It is as follows :

73. Clark, Dodge & Co. v. W. K. Heiskell, acceptor,	
and Thomas L. Preston, on an acceptance due March	
21st, 1859, . . . . .	\$2017 05
Interest to July 12th, 1862, . . . . .	400 38
	<hr/>
	\$2417 43

Received of Robert Gibboney, trustee of Thomas L. Preston, the sum of \$2417.43 cents, according to the above statement, which debt was due from Thomas L. Preston, and recognized as such in his deed of trust to said Gibboney, and so paid me under the sequestration law as receiver for Washington County, the said Clark, Dodge & Co. having domicil in the State of New York.

July 12, 1862.

JOHN W. JOHNSTON,  
Receiver for Washington County.

In exhibit (Z), being trustee's settlement before Commissioner H. S. Mathews, under date of 4th November, 1862, Gibboney takes credit to himself, under date of July, 1862, as follows : " By amount paid John W. Johnston, receiver, \$2417.43." The identity of the sum proves beyond all doubt the identity of the item. See exhibits of Thomas L. Preston, p. 105.

This is indubitable documentary proof, that Gibboney, as trustee, has received credit for this payment to the receiver. Where now is the proof that he made this wrongful payment under any species of duress whatsoever ? The language of his receipt sets out the domicil of Clark, Dodge & Co. as in New York ; the suit being brought in the United States Court, evidenced the jurisdictional fact that these suitors resided in another State ; and I have no doubt that that residence was, under the proofs in this cause, known by Gibboney to be in New York. Hence, he was aware of his duty in behalf of these *cestui que trusts*, to re-

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Opinion of the court.

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fuse to receive this debt, and under the terms of this deed, to demand in its stead a note or notes at such time as would probably outlast the rebellion. Did he, in good faith, such as is exacted of a fiduciary under these circumstances, seek in the mode thus provided by the deed to *tide* this debt over the war, and protect these loyal citizens in their just claims? He surely had the opportunity and authority to do so; but no proof is offered of any attempt on his part thus to protect these residents of a loyal State in their rightful dues during the rebellion. On the contrary he seems to have seized with impatience and haste this opportunity of signaling his fealty to the insurrectionary tribunals of the revolted States, and of acquiring cheaply and at the expense of those whom he should have protected and not betrayed, a reputation for a flaming, superserviceable zeal in these ungracious, if not vengeful, tasks of confiscation. While I acknowledge the favor shown by the courts to fiduciaries in the honest and well-meant, though *mistaken*, discharge of their duties, I cannot but regard the voluntary participation of the trustee in this lawless act of sequestration under the proofs in this cause, as a reprehensible breach of trust, properly entailing upon his estate, the recovery sought of it in this cause. Whatever relief he may be entitled to from his confederates in this wrong-doing, must be sought in another action and before another tribunal. I am clear, neither his grantor nor his vendees can be required to indemnify him for this wrongful and void payment to the Confederate receiver.

Hence, a decree must be entered in the original suit for the plaintiffs' debt, and interest and costs, with a reservation of their right to charge the estate of Preston in the hands of his present trustee, if the execution *de bonis testatoris* in this case should prove fruitless, and the cross-bill of Gibboney's testatrix must be dismissed with costs.

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*United States Circuit Court, Western District of Virginia, at  
Abingdon, 1876.*

KAIN, BISHOP, v. GIBBONEY ET AL.

A clause in a will which provided that if the testator should become a member of any of the religious communities attached to the Roman Catholic Church and should be so at the time of her death, then the previous bequests of her will were to be avoided, and a fund named in the will was to go to Richard V. Wheelan, as bishop of said church, or his successor in said dignity, in trust for the benefit of the community in which she should die a member. *Held*, not to be a good bequest to the "Sisters of St. Joseph," as beneficiaries, and to Bishop Kain, successor to Bishop Wheelan, as trustee, for want of certainty.

IN equity.

The opinion of the judge sets out the facts of the case.

RIVES, J.—According to the view presented of this cause by the complainant's counsel, it grows out of the conceded fact that the defendant, Robert Gibboney's administratrix, is accountable for a fund of about \$8000 belonging to the estate of the late Eliza L. Matthews. That lady left a will, dated the 9th of December, 1854, which was admitted to probate in March, 1861. By this will it was provided that if she became a member of any of the religious communities attached to the Roman Catholic Church, and should be such at the time of her death, then the previous bequests of her will were avoided, and the fund in question, by the terms of the will, was to go to Richard V. Wheelan, as bishop of said church, or his successor in said dignity, for the benefit of the community of which she died a member. It is averred that this contingency happened. That she died a member of a religious community attached to the Roman Catholic Church, known as the "Sisters of St. Joseph;" hence this suit is brought to recover this fund of the female defendant, so ascer-

## Opinion of the court.

tained to be in her hands. This recovery depends on the validity of this bequest to the complainant; if void through his incapacity to take, or the uncertainty of the beneficiaries, then it must revert to the next of kin or heirs at law of the testatrix. Hence the obvious propriety and necessity of making them parties to this suit.

But this necessity is supposed to be avoided by the result or compromise of a suit on which the complainant relies as having established his title to this fund. At my instance the record of that suit has been brought into this case. It appears to have been a bill of Alexander S. Matthews, a brother of the testatrix, denying the existence of the will on the sole ground of the incompetency of the alleged testatrix by reason of her infancy, and asking for an issue of *devisavit vel non*. The heirs at law of said Eliza L. Matthews were, of course, made defendants to this bill. In October, 1871, this issue was granted, and directed to be tried as between the legatees propounding the will, as plaintiffs, and the heirs at law as defendants. This was all that was really contemplated by the bill. No question was raised as to the validity of the bequest to Bishop Wheelan. And it is not seen how the prayer for general relief under such circumstances can be interpreted as enlarging the scope and design of said bill.

Under this state of pleadings a decree was made by consent of counsel, setting aside and dismissing this issue of *devisavit vel non*, and after awarding Alexander S. Matthews one-tenth of this fund, and providing for certain other payments, directing "the devisee under the will of said Eliza Matthews to collect the residue of said estate." It is assumed and may be conceded that by the "devisee" the complainant in this case is meant.

Now it is claimed that by this decree, either as *res adjudicata*, or agreement of parties, all questions as to the validity of this bequest was conclusively abandoned or waived; and the title ascertained to be only in the parties recognized as claimants by this consent decree. Hence, none but these parties are now made defendants to this present bill.

But it is apparent that this consent decree does not purport to be the judgment of the court. Nothing was thereby submitted to

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the court or passed upon by it. There is, therefore, no pretence for assigning to it the rank and conclusive effect of a *res adjudicata*.

Nor can it be regarded as an agreement embracing the validity of this bequest, and foreclosing all future questions in regard to it. The authority of the counsel signing this decree to bind the parties to such an agreement, so evidently beyond the sphere of their employment in this case, may be well questioned. At any rate, the decree by their consent cannot bind the infant heirs at law of Eliza L. Matthews, defendants to that cause.

I think, therefore, the bill in this case is framed upon a misconception of the legal force and effect of the consent order in the case of *Alexander S. Matthews v. The Administrator and Heirs at Law of Eliza L. Matthews, deceased*, and is, therefore, demurrable for want of proper parties. This defect, however, is curable through leave to amend.

But with my opinion of the incapacity of the former or present plaintiff to sue, or take under this bequest, and of the invalidity thereof from the want of the requisite certainty of the beneficiaries, it would be improper to grant this leave. I cannot believe that the terms of the bequest designate the Bishop of Wheeling, or his successor *personally*, as *the trustee*, without reference merely to his *official* character and *official* succession; on the contrary, I am of opinion that the employment of the term "trustee" is merely in substance and meaning a substitute for the phrase "in trust," used in the pecuniary legacy of \$500 in the first clause of the will. But even if this were not so, the *cestui que trust*, the "Sisters of St. Joseph," cannot be recognized as valid claimants under this will, and it is not in the power of this court to allow the enforcement of so vague, uncertain, and illegal a trust. The demurrer, therefore, to the sufficiency of the bill must be sustained, and the bill dismissed.

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Statement of the case.

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*United States Circuit Court, Eastern District of Virginia, at Norfolk, May 5th, 1879.*

A. B. GREEN v. W. A. S. TAYLOR ET AL.

In a case, in which an abatement was claimed for an alleged deficiency in the sale of a tract of land, in which the husband and wife were both made parties defendant, but the wife was not a necessary party defendant; *Held*:

1. That the husband is a competent witness to testify *in favor* of any interest of the wife, but is incompetent to testify *against* any such interest.
2. That the words "sale in gross," when applied to the land itself, are synonymous with "contract of hazard," and preclude any claim for abatement in the purchase-money.

IN equity.

In the early part of December, 1872, W. A. S. Taylor was in Hampton. Whilst there he was approached by A. B. Green, who desired to purchase of him a tract of land near Newport News, of great prospective value, on account of being near the expected terminus of the Chesapeake and Ohio Railroad; land which he derived from his wife. Taylor agreed to write him from Norfolk (Taylor's home) a response to his proposition. On his return he wrote Green as follows:

NORFOLK, VA., December 3d, 1872.

DEAR SIR: Mrs. Taylor can be induced to take for the farm \$25,000, that is, about \$62½ per acre (399⅔ assessed). She would entertain no proposition based simply on its agricultural value. I write in response to your request of yesterday. Of course, we do not hold the proposition open longer than your prompt reply.

Yours truly,

W. A. S. TAYLOR.

P. S. Please keep offer to yourself. I desire no one to know it.

W. A. S. T.

This letter was never answered, and that negotiation terminated with it. About two weeks after this, one Titlow, a real estate agent of Hampton, the county-seat of the county where the

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Statement of the case.

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land lay, made renewed overtures to Taylor, which were rejected; but Green denies Titlow's agency. Afterwards, on the 1st of January, 1873, Mr. Thomas Tabb, a prominent lawyer of Hampton, acting as the agent of Green, renewed negotiations with Taylor for the purchase of the land, offering \$25,000, which was accepted. The deed was drawn by Mr. Tabb in Taylor's presence, and the boundaries furnished by Mr. Tabb, who was familiar with the property. In drawing the deed, Mr. Tabb inserted the clause "containing 400 acres more or less." Taylor refused to execute a deed guaranteeing any particular quantity, and insisted upon the insertion of a clause protecting him from any trouble on that score. Mr. Tabb then inserted the following clause, declaring that it would be sufficient to meet Taylor's purpose (Taylor not being a lawyer):

The said tract of land is sold in gross and not by the acre, and embraces the tract of land devised to Martha, the wife of the said William A. S. Taylor, by will of her father, the late Edward Parrish, and also the tract acquired by her under the will of her uncle, the late John Parrish.

A third of the purchase-money was paid in cash, and the balance evidenced by two bonds secured by deed of trust on the land. The first bond was paid at maturity, and part of the second. After the greater portion of the second bond had been overdue, some two years or more, Taylor directed Mr. Tabb, the trustee, to sell under the trust deed. Thereupon Green filed a bill of injunction, in which he alleged a deficiency of 80 acres in the quantity mentioned in the deed, and claimed abatement therefor, making Taylor and wife and Tabb parties defendant. Mrs. Taylor had joined, according to the mode prescribed by law, in the deed of Taylor and wife to Green, but the bonds for the deferred payments were made payable to Taylor individually. Taylor answered the bill, claiming that the contract was a sale in gross, and denying Green's right to any abatement. A survey taken by order of court in this suit showed a deficiency of 63 acres. Taylor's deposition was taken in support of his answer, in which he detailed the conversation between himself and Tabb, held at the time of the execution of the deed. To this deposi-

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tion the plaintiff excepted, on the ground that the husband could not testify either for or against his wife's interest, in a case where both were parties. The exception was overruled, the court filing the following opinion on that point:

HUGHES, J.—Depositions of Taylor, the defendant, have been taken and filed in the cause, which are excepted to by complainant's counsel, on the ground that Taylor is an incompetent witness in consequence of his wife being a party to the cause. No objection is made by Green to the validity of Taylor's title to the land mentioned in the bill of complaint. In that bill Green prays for an injunction against the sale of the land which had been advertised under a trust deed after default in the payment of the last instalment of the purchase-money. Taylor was simply proceeding to collect a chose in action, in which his wife has no interest. Green's objection to the sale is that the tract of land does not contain as many acres as it was represented by Taylor to embrace, and he claims an abatement of price. He does not seek to avoid the contract of sale for fraud or otherwise. The deposition of Taylor relates to what transpired between himself and Green on the subject of the quantity of land at the time of Green's purchase of the land. Mrs. Taylor seems to have no interest in the controversy, and is merely a formal party to the cause, made so by Green in his bill; which the defendant, however, did not demur to on that ground. The incompetency of husband or wife as a witness in cases where the other was party to a suit, was by the old law based upon two grounds, viz., 1st, that of interest; and 2d, that of public policy.

But section 858 of the Revised Statutes of the United States (passed in 1864, which is a substantial adoption of Lord Denman's Act), removes the first ground in the Federal courts of this country, and allows parties to a suit interested in the result to testify as competent witnesses.

The other ground of objection to the testimony of husband and wife is also wellnigh abolished in all civil cases in England; namely, the ground that the admission of their testimony would be against public policy. Before the acts of Parliament in England which were designed to remove this objection, the decisions

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Brief for defendants.

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of the English courts had greatly relaxed this rule, even in criminal cases. See *R. v. All Saints*, Worcester, 6 M. and S. 194; *R. v. Bathwick*, 2 B. & Ad. 647; *R. v. Williams*, 8 C. & P. 284. But see also *R. v. Gleed*, 3 Russ. on Crimes, 4th Eng. ed. 631. These cases go upon the distinction between incompetency and privilege.

In this country the old rule in regard to the impolicy of such testimony remains, but I think I hazard nothing in holding that it is so much relaxed that it is not enforced except in cases where the testimony of husband or wife would be *against* the other in civil cases. See *William and Mary College v. Powell*, 12 Grat-tan, 382; also *Stein v. Borman*, 13 Peters, 209.

The testimony of Taylor in this case cannot, under any sort of conjecture or by any possibility, be injurious to his wife. She is a party merely in form, having no interest in the recovery. If by possibility she have an interest, the testimony of her husband is in support of that interest, and not against it. The reason of the rule of evidence in question does not, therefore, apply here. *Cessante ratione, cessat et ipsa lex*. I see no sufficient ground, therefore, for the exclusion of Taylor's evidence.

Thereupon the case came on for hearing upon the issues of law raised by the bill and answer, and was argued by Legh R. Page, for complainant; and by Burroughs & Brother, and Sharp & Hughes, for the defendant, Taylor.

The briefs of the other counsel have been taken from the papers in this cause. That of Sharp and Hughes was as follows:

BRIEF OF COUNSEL FOR DEFENDANTS.

The questions in this case are:

(1.) If Green is entitled to any abatement, should it be for seventy-five acres, the amount of deficiency shown by defendant's survey, excluding the part between high- and low-water mark from being counted in the amount named in the deed, or for only sixty-three acres, the amount of deficiency including that between high- and low-water mark in the deed.

(2.) Is he entitled to any abatement, admitting the deficiency?

1. The first question is tantamount to this: Does a deed describing land as bounded by a navigable river (not as included

between certain metes and bounds), convey the lands to high-water mark or to low-water mark? That is, does the ownership of riparian proprietors extend to high-water mark or to low-water mark?

We maintain that the twelve acres should be included in the amount of land named in the deed. It is well settled in Virginia that the ownership of riparian proprietors extends to low-water mark. If not settled by the present statute (V. C. ch. 62, sec. 2), on the ground that the words "right and privileges" do not mean ownership, the original statute (1 R. C. 1819, ch. 87, p. 341; Acts 1819, ch. 28) shows this to have been the meaning of the Legislature. The original statute reads: "Hereafter the limits or bounds of the owners shall extend to ordinary low-water mark," and the present statute, which is but an abstract of the original one, evidently intends to pursue the same policy. And in the case of *Hundley's Lessee v. Anthony*, 5 Wheat. 374, the United States Supreme Court expressly decides that the ownership of riparian proprietors extends to low-water mark. This view was subsequently confirmed in *Garner's Case*, 3 Gratt. 624; in *French v. Bankhead*, 11 Gratt. 159-60, and is stated by Prof. Minor (2 Minor's Insts., p. 20) to be the settled law of Virginia.

The law is plain enough. But there are in the papers a couple of affidavits to the effect that it is the special custom in that locality to include land only to high-water mark. What are those affidavits worth? A special custom in the sense of a local law cannot exist in Virginia, especially in contravention of an express statute. *Harris v. Corson*, 7 Leigh, 632; *Mason v. Moyer*, 2 Rob. 600; *Gross v. Criss*, 3 Gratt. 252; 2 Minor's Insts. 493 and 95. Nor can such a custom be proved or admissible in evidence, to vary a written contract (authorities, *supra*, and 2 Minor's Insts. 95, 168-9, 955-6). But even supposing such a custom admissible in evidence, it has not been proved in this case. An affidavit can no more prove a custom than it can prove any other fact. We are as much entitled to a cross-examination as we would be if the question of quantity itself was to be proved by deposition. On no ground can the twelve acres between high- and low-water mark be excluded from the land conveyed by the deed.

2. Next, is Green entitled to any allowance for the deficiency?

He says in his bill that he was misled as to quantity by Taylor's representations, and that whether they were innocent or not, he should be relieved from this mistake. We deny that Taylor made any representation as to quantity. Green, by accepting the form of deed which was given him, precluded himself from any allowance for the deficiency. In other words, it is a sale in gross or contract of hazard. By accepting a deed for a sale of this character Green defeated all chance of compensation. It is well settled that in sales of this character no allowance is made for deficiency. Quantity is supposed to be no part of the contract, to be mere matter of immaterial description, and not a matter of representation. We admit that the presumption is against such contracts, and that in doubtful cases courts will incline to construe them cases of sale by the acre. But when we examine the cases decided in Virginia, and see what doubtful cases have by them been construed to be sales in gross, or contracts of hazard, we can entertain no doubt of the result of this case, where the deed expressly provides that "this is a sale in gross and not by the acre."

It is useless to quote or investigate English authorities on the subject, for the numerous decisions of the Court of Appeals of Virginia, nearly thirty in all, and the philosophical treatises contained in such works as Minor's Institutes and Lomax's Digest, settle the law for Virginia independently of any other decisions. Sales of land are divided into three classes.

(1.) The first class is the sale of a specified number of acres at a named price per acre, commonly designated as sales by the acre. In this class, in cases of excess or deficiency, relief will be granted, for here the quantity is of the essence of the contract, and in case of a deficiency the vendee did not get what he bargained for. To this class belong the cases of *Carter v. Campbell*, Gilmer, 170; *Neal v. Logan*, 1 Gratt. 14; *Triplett v. Allen*, 26 Gratt. 722; *Bierne v. Erskine*, 5 Leigh, 59.

(2.) The second class is of sales of an estimated number of acres for a gross sum. This class is commonly known as sales by estimation or sales for a gross sum. In this class also relief is allowed for errors too great to be imputable to mistakes in survey, for in this class also the parties are influenced by the quantity to a material extent in assessing the price, and quantity is of the

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Brief for defendants.

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essence of the contract. The cases under this class are *Quesnel v. Woodlief*, 6 Call. 238; *Bedford v. Hickman*, 5 Id. 236; *Nelson v. Carrington*, 4 Mun. 332; *Nelson v. Matthews*, 2 H. and M. 164; *Duval v. Ross*, 2 Mun. 290; *Blessing v. Beatty*, 1 Rob. 304; *Crawford v. McDaniel*, 1 Id. 474; *Walsh v. Hale*, 25 Gratt. 314; *Hoback v. Kilgore*, 26 Id. 442.

(3.) The third class is of sales of a gross tract of land, as by specified boundaries, or described as "that parcel obtained by inheritance," or "that parcel mentioned in a certain survey." The technical name of this class is a sale in gross or a contract of hazard. The cases in the Virginia reporters comprised under this class are *Jollife v. Hite*, 1 Call. 301; *Pendleton v. Stewart*, 5 Call. 1; *Hull v. Cunningham*, 1 Mun. 330; *Grantland v. Wight*, 2 Mun. 179; *Fleet v. Hawkins*, 6 Mun. 188; *Tucker v. Coeke*, 2 Rand. 51; *Foley v. McKeown*, 4 Leigh, 627; *Keyton v. Brawford*, 5 Leigh, 39; *Russell v. Keeran*, 8 Leigh, 9; *Seamonds v. McGinnis*, 3 Grattan, 305; *Jones v. Tatum*, 19 Grattan, 735; *Caldwell v. Craig*, 21 Grattan, 132.

The confusion which long shrouded the subject was caused by confounding the last two classes. In the second class it is well settled that relief is granted; in the last class, of sales in gross, it is equally well settled that mistake in quantity is no ground for relief. In the second class quantity is of the essence of the contract. In the last class the vendee desires a specified tract, and quantity is mere matter of description, not a matter of warranty, and not supposed to influence the price to any material extent. Green may say in his bill that he relied on Taylor's representations as to quantity, and intended to buy so much. But by his acceptance of a deed of that form, the law makes him say the opposite. It makes him say that he did not care about the quantity, and only desired the tract.

In the words of Judge Staples in *Caldwell v. Craig*, 21 Grattan, 136:

It is difficult to imagine a case where the purchaser, in the price he agrees to pay, is not influenced by his estimate of the quantity. And if a mistake of this sort affords ground for equitable relief, it is clear there could no longer be a contract of hazard. We know, however, that such contracts, when fairly made and clearly estab-

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lished, are uniformly enforced by the courts. Nor is there any injustice in this principle of equitable jurisdiction. If the vendee encounters the hazard of a deficiency, the vendor incurs that of an excess; and it is impossible to say that this very hazard did not constitute an important element of the price. For whether the case be one of excess or deficiency, the mistake is not in the substance of the contract, but in relation to the very risk in the contemplation of the parties.

And the case of *Pendleton v. Stuart*, 5 Call. 1, also decides that in sales in gross the quantity is *not of the essence of the contract, but is mere matter of description*.

The authorities are remarkably unanimous in holding that relief is denied in cases of *sales in gross* or *contract of hazard*, for, in *Russell v. Keeran*, 8 Leigh, 19, and *Blessing v. Beatty*, 1 Rob. 319, and in the very last case decided (*Watson v. Hoy*, 28 Grattan, 704), these two phrases are everywhere used as synonymous, and are stated to mean, *ex vi termini*, the same thing. There is not a case of a sale in gross in which relief was decreed on the ground of mistake in quantity. Any fraud, such as that in *Bedford v. Hickman*, 5 Call. 1, and *Duval v. Ross*, 2 Mun. 290, or any eviction by title paramount might be ground of relief even in sales in gross. But in the case of fraud, that would afford a distinct ground of equitable intervention. There is, however, in this case no proof or even hint of fraud. And in case of eviction by title paramount, relief would be decreed; for, besides the fact that it would fall under the covenant of general warranty, the vendee might lose the best portion of the tract of land that he contracted for, and be frustrated in the main object of his purchase. But these are the only grounds for relief in cases of sale in gross; for mistake in quantity, an immaterial matter of description, where a tract of land is bought as a tract, frustrates no object of the vendee, works no hardship upon him, or at least none which he has not expressly waived, and to which the vendor was not equally liable.

All the cases where relief has been allowed on the ground of mistake were either sales by the acre or else sales by estimation, or as they are sometimes called, sales for a gross sum, and it is admitted that in such cases relief is proper. *Quesnel v. Woodlief* and *Blessing v. Beatty* were both cases of this class, and neither

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of them extend the doctrine to sales in gross. The latter case grants relief on the express ground that the case at bar was a sale for a gross sum, and in a dozen different passages uses the words "sale in gross as synonymous with contract of hazard," and states that were the case at bar such a case, no relief would be granted. As for example (p. 318), "This (stipulation) changes a sale by the acre into a contract of hazard, and necessarily excludes the interposition of equity on the ground of mistake." And again (p. 319),

We must bear in mind that upon the question of compensation, the substantial distinction is between a sale that is a contract of hazard and one that is not. When "a sale in gross" is used as equivalent to a contract of hazard, the term is properly applicable not to the price but to the subject; for a sale by the acre may be a contract of hazard, and a sale for a gross sum may not. A sale in gross when applied to the thing sold means a sale by the tract without regard to quantity, and in that sense is (8 Leigh, 19) *ex vi termini*, a contract of hazard.

The very latest case reported (*Watson v. Hay*, 28 Grat. 704) says that the sale of a certain tract is a contract of hazard. p. 704 *et seq.*

This is just the ground on which we stand in this case. We maintain that the words "sale in gross," are in this deed synonymous with "contract of hazard." We so hold because the manner in which it is used in the deed shows it to have been so intended. The deed expressly provides, "This is a sale in gross and not by the acre, and embraces all that tract left to the wife of the vendor by her father." The case of *Hull v. Cunningham*, above quoted, decides that a description of a tract as "that inherited," etc., shows that the sale of a tract in gross was intended. The cases of *Grantland v. Wight*, 2 Mun. 179; *Foley v. McKeown*, 4 Leigh, 627; *Seamonds v. McGinnis*, 3 Gratt. 309, decide that when land is sold by metes and bounds, the sale of a tract in gross is intended. In this deed the words "sale in gross" are evidently applied to the thing sold and not to the price, and consequently mean, *ex vi termini*, a contract of hazard. This is the regular legal meaning of the words as shown by their continual use in that sense in Minor's Institutes (vol. ii, p. 626, and also pp. 794-5), Lomax's Digest (vol. ii, marginal page 61-

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8), and all the cases quoted at the beginning of class No. 3. This being the legal sense of the words, we may with confidence invoke the well-settled rule of construction (2 Minor's Insts., p. 951), that parties are presumed to use technical or legal words in their technical or legal sense, a presumption which is strengthened by the proof of the circumstances under which the deed was made. The deed was drawn by an experienced and distinguished lawyer (Colonel Tabb), who certainly knew the legal meaning of the words employed by him. It is in evidence that when the statement of quantity was inserted the vendor stopped him, and refused to warrant the quantity; that Colonel Tabb then inserted the above-quoted sentence for the express purpose of protecting Mr. Taylor from any future trouble on that score; that until those words were inserted Taylor refused to accept the deed, and that it was accepted by both Mr. Taylor and Colonel Tabb, Mr. Green's agent, as a guarantee against any future litigation. The very fact that the round number of 400 acres was used, is of itself pregnant proof that it was mere matter of immaterial description, and that a contract of hazard was in contemplation. These are the surrounding circumstances admissible in evidence as placing the court in the exact position of the contracting parties, and thus enabling it to form an unerring judgment of their intention. All the evidence, both circumstantial and positive, shows that both parties contemplated a contract of hazard, and it is perhaps useless to quote any more authorities to show that relief cannot be granted. It may, however, be well to quote a few extracts from the leading cases to substantiate this view of the law. In the case of *Tucker v. Cocke*, 2 Rand. 51, Judge Green (pp. 65-7) says:

This was therefore a contract of hazard, without any fraud, concealment, misrepresentation, or negligence on the part of the vendor. The error in respect to the quantity of land was mutual, *and was not in relation to the substance of the thing contracted for*; but in relation to the very hazard contemplated by the parties, the question is whether the disappointed party is in such case entitled to relief. . . .

If relief could be given in such a case as the case at bar, *a fortiori*, it should be given if the vendor knew of the deficiency and concealed it. So that in both cases, when the vendor knew and when he was ignorant of the deficiency, relief being given, there could no

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longer be a contract in which a purchaser could take the risk of a deficiency effectually upon himself. The Court of Appeals have uniformly recognized the validity and obligation of such a contract, and in all cases in which they have given relief it has been founded on circumstances either of fraud, misrepresentation, or concealment, or mistake in whole or in part in relation to the substance of the thing contracted for. . . . .

So also in *Jollife v. Hite*, 1 Call. 326-7.

If it was meant to change or set aside a real contract for the sale of a tract of land in gross, at the risk of the purchaser for gain or loss by a deficiency or excess in the quantity it was supposed to contain by both parties, I do not hesitate to say that it was carried too far, being an interference with fair contracts which no court has a right to make, since there was no mistake in the contract, whatever there might be in the estimate contemplated. Such contracts are made every day for the purchase of tracts of land in gross.

To the same effect are the cases of *Pendleton v. Stewart*, 5 Call., and especially *Caldwell v. Craig*, 21 Gratt. 136-40. And this view is the view taken by Lomax, in 2 Lomax's Digest, 61-8, and by Professor Minor, in 2 Minor's Institutes, 626, and also 793-5, in which latter passage all the Virginia authorities are classified and digested so philosophically and accurately that those three short pages are a complete epitome of the law, and render useless any reference to the original cases. Without insulting the court by any further argument on a doctrine so well settled in view of the preceding authorities, we may safely maintain that in cases of contracts of hazard no relief is granted for mistake in quantity on the sole ground of mistake; that sales in gross and contracts of hazard are synonymous terms, and that the contract embodied in the deed from Taylor to Green was a contract of that description, and that an abatement in the purchase-money cannot on that ground be decreed.

Nor is the deficiency in this case greater than in many of the cases in which relief was denied. Including the part contained between high- and low-water mark, the deficiency would be 75 acres, or about one-fifth. But the counsel for the plaintiff will hardly dispute in seriousness the proposition that this should be included in the tract, and this would reduce the deficiency to 63 acres, or about one-seventh. In *Jollife v. Hite* the statement was

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578, the true amount 512, a deficiency of more than one-ninth. In *Pendleton v. Stewart* the stated amount was 1100, the true amount 940, a deficiency of one-seventh. In *Fleet v. Hawkins* the stated amount was 370, the true amount 338, a deficiency of one-eleventh. In *Tucker v. Cocke* the stated amount was 10,000 or 12,000, the true amount 9000, a deficiency of one-tenth or one-fourth. In *Foley v. McKeown*, the sale of a town lot, the deficiency was nearly half. In *Keyton v. Bradford* the stated amount was 340, the true amount was 290, a deficiency of one-eighth. In *Russell v. Keeran* the stated amount was 405, the true amount 290, a deficiency of one-third. In *Seamonds v. McGinnis* the stated amount was 140, the true amount 200, an excess of one-third. In *Caldwell v. Craig* the stated amount was 1000, the true amount 800, a deficiency of one-fifth. The above authorities dispose of the claim for relief on the ground of mistake. The claim on the ground of misrepresentation is equally futile. For if innocent it comes under the head of mistake, and the above authorities are applicable. There was, however, no representation of quantity made. The only one was the first letter of Taylor containing an offer which was not accepted by Mr. Green, and the negotiations ensuing, which fell through completely. This, therefore, had nothing to do with the contract effected long after, for in the words of Judge Roane, in *Jollife v. Hile*, 1 Call. 307 :

In a contract every serious and deliberate communication which has taken place between the parties relative thereto, so far as a former one has not been revoked by a latter, must be considered as forming the basis of the contract, *with this exception, that the treaty must not at any intermediate time have been at an end.*

But even if, despite all the above authorities, Mr. Green was entitled to an abatement, his long delay in asking for it precludes him from obtaining it. He pays the first instalment promptly ; he makes no objection to the deficiency ; he takes no steps to ascertain the deficiency ; and now when years have elapsed and when the troubles of the Chesapeake and Ohio Railroad show him that he has engaged in a losing speculation, he adopts this plan of getting out of his bargain. But he is too late. Equity will not help those who sleep upon their rights ; will not lend

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its aid towards fomenting strife; will do nothing that can tend to increase litigation; and will not be the instrument of disappointed speculators. The interests of society, which demand the quiet and security of titles and the end of litigation, cannot be sacrificed in favor of those who delay their complaints until the eleventh hour. These principles alike of policy and justice have been reaffirmed numberless times in the various cases above quoted, *e. g.*, in *Jollife v. Hite*, 1 Call. 315.

And if Green were not precluded from praying relief by his *laches*, he would be by the subsequent acquiescence, both implied and actual, which characterizes this case.

The failure for so long a time to take steps to ascertain whether any deficiency existed, even if he had no knowledge of any deficiency, is, on the authority of the cases above cited, an implied acquiescence and a convincing argument to show, independent of that inferred from his acceptance of the deed, that he considered it a sale in gross, and thought it useless to set up any claim for deficiency. But it is in evidence that he thought there was a deficiency not long after the contract was made; that, though he often complained of it, he never set up any claim for abatement therefor; that, knowing and having long known of it, he nevertheless, after some time spent in asking further time of Taylor, entered into new arrangements to pay the *entire purchase-money* without once suggesting or asserting any right to demand an abatement. Not until he had failed to fulfil the new contract, and the property was advertised for sale under the trust deed, did he assert such a claim, and only as a last resort. What stronger acquiescence could be demanded than this?

HUGHES, J.—The chief reliance of complainant is on Taylor's letter of December 3d, stating the quantity of the land at about 400 acres. But the negotiation of which that letter was a part fell through. The negotiation which was carried into effect was that of January following. This negotiation was commenced by Mr. Tabb, as agent of complainant and trustee in the trust, who was fully as conversant, probably even more conversant with the property, its title and its quantity, than Taylor. It is difficult to suppose that Mr. Tabb could have been imposed upon by

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Taylor on that subject ; and Mr. Tabb was agent of Green, the purchaser ; Green standing there in the presence of Tabb, possessing as full knowledge of the subject of the sale as Taylor possessed.

The letter, therefore, is no part of the *res gestæ*. We can look only to the deed.

That this sale by Taylor to Green was a contract of hazard is written in the deed. The deed conveyed a certain tract of land, bounded on the south by Hampton Roads, and by the lands of several named landowners on the north, east, and west, "containing 400 acres, more or less." No metes and bounds by courses and distances were set out. It contained a recital that "the tract of land is sold in gross and not by the acre, and embraces the tract of land devised to Martha, the wife of the said W. A. S. Taylor, by will of her father, the late Edward Parrish, and also the tract acquired by her under the will of her uncle, the late John Parrish." This language fulfils all the requirements which have been held by the courts to constitute a contract of hazard. The language quoted was inserted by a skilful and learned lawyer of the highest standing and reputation, who was acting at the time as the agent of Mr. Green ; who was fully cognizant of the technical meaning of the language which he used ; who was acquainted with the character of the land and the previous negotiations of the vendor and vendee ; and who inserted the language in consequence of the refusal of the vendor to execute the deed unless this clause, making the sale a contract of hazard, was inserted. The clause was a matter of mutual consent between the vendor and the vendee's agent ; and was put into the instrument in order to make clear the intention of the parties to be that this was a sale in gross and contract of hazard. If this is not a contract of hazard, it is difficult to imagine what can be such a contract. In law it is binding upon the parties as such.

I do not see that the plaintiff has much equity on his side. The deficiency of sixty-three acres shown by the survey in a tract thought to have contained about 400, is not as great as has been repeatedly held by our Court of Appeals not to entitle a vendee to an abatement of price ; and there is no evidence that complainant's objection on this score was made with such promptness as

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Syllabus.

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to indicate a sense of wrong on the discovery of the deficiency. The sale was made in January, 1873, and I see nothing to indicate dissatisfaction with the quantity before 1877, after several instalments of purchase-money had been paid, and after he had been allowed an extension upon other instalments by the vendor.

If his equity were clear, this would be gross laches. A court cannot undertake to set aside solemn contracts as deliberately made and as long acquiesced in as this was, where there is no fraud and no intentional deception practiced. The bill must be dismissed.

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*United States District Court, Eastern District of Virginia, at  
Richmond, April 16th, 1879.*

STORRS BROTHERS v. ENGEL & SON, EX PARTE E. M.  
GARNETT, ASSIGNEE IN BANKRUPTCY.

Where an order of seizure was given in an involuntary bankruptcy proceeding against goods in the hands of a purchaser by sale afterwards adjudged to have been fraudulent; and on this purchaser's petition the goods were released to him on his giving a joint and several bond to the marshal, with sureties for the forthcoming of the goods, or else to answer the future judgment of the court in the matter; and plenary proceedings were afterwards instituted in the District Court on its equity side against the purchaser and his securities on this bond to set aside the sale; and a decree was in due course rendered declaring the sale to have been fraudulent, and decreeing the value of the goods to be paid by the fraudulent purchaser and his sureties; and the purchaser (not joined by his sureties) appealed to the Circuit Court, giving an appeal bond with new sureties; and, after decree of the Circuit Court affirming the decree below, the said purchaser appealed to the Supreme Court, giving an appeal bond with still new surety, and that appeal was dismissed; and then execution was taken out against the fraudulent purchaser, on which only a small part of the debt was made, leaving a large balance unpaid; and a petition was filed in the bankruptcy proceeding by the assignee against the sureties in the original delivery bond (not making the fraudulent purchaser a party) for the payment of the balance due under the decree; and the said purchaser soon after died insolvent, but leaving real estate not sufficient to satisfy by sale the amount of the decree;

*Held*, On demurrer and answer, that the assignee in bankruptcy could select which of the several bonds to proceed upon, and might proceed upon

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the original delivery bond, and this being joint and several, he might proceed against any one or more of the obligors.

*Held, also,* That the assignee might proceed by summons or petition, and need not resort to a plenary suit upon the bond.

*Held, also,* That the assignee might proceed at once against the sureties in the original bond, and need not first subject the real estate of the fraudulent purchaser of the goods replevied before so doing.

### IN bankruptcy.

In June, 1870, Storrs Brothers filed in this court a creditor's petition in involuntary bankruptcy against Engel & Son, retail drygoods merchants of Richmond, Virginia.

There was an adjudication of bankruptcy upon the petition on the 23d of the same month. Among other acts of bankruptcy relied upon, the petition charged that within six months before the filing of the petition, to wit, on the 16th of May, 1870, the defendants had sold, in block, the contents of their store in Richmond, being their whole stock of drygoods in trade, for a lump sum, to one Lisberger; that this was a sale in fraud of creditors, by an insolvent, in contemplation of bankruptcy; that Engel & Son's insolvent condition was known to Lisberger; that Lisberger was party to the fraud, and was then selling and disposing of the goods in question. The petition, therefore, prayed for an order of seizure against the goods. The petition was supported by the usual affidavits. The court thereupon immediately entered an order directing the seizure of the stock of goods, which was executed by the marshal on the same day.

On this same day Lisberger filed his petition denying the charges of the creditor's petition affecting the *bona fides* of his purchase of the stock of goods from Engel & Son, and praying that, on his executing to the marshal a bond, with security approved by the marshal in such penalty as to the court might seem proper, conditioned for the forthcoming of the said goods or the value thereof, and to abide such further order as might be made by the court, the stock of goods might be returned to him.

The court on the next day granted the prayer of Lisberger's petition, in an order running nearly in the terms of its prayer; and on the same day, on Lisberger entering into a bond to the marshal, conditioned as described, in the penalty of eight thou-

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sand dollars, with M. Rosenbaum and two other persons (who have since become discharged bankrupts) as sureties, the marshal delivered the stock of goods to him. M. Rosenbaum was one of the principal creditors of Engel & Son, and proved his claim in bankruptcy. The bond was joint and several.

In due course of proceeding, Otway D. Brown was afterwards elected the assignee of Engel & Son in bankruptcy, and qualified as such. Brown was a clerk in the employment of Rosenbaum, who is a large wholesale drygoods merchant of Richmond. Counsel for most of the creditors desired a proceeding to be instituted for the purpose of annulling the sale which Engel & Son had made of the stock of goods to Lisberger, but Brown refused to take the proper steps for the purpose, alleging, in excuse, the opposition of his employer, Rosenbaum, to such a measure. Finally, after the lapse of several months, Brown was, on petition of creditors, removed as assignee, and the present assignee, E. M. Garnett, was appointed on the 4th of April, 1871.

On the 11th day of that month, Garnett filed a petition in the bankruptcy proceeding, charging in detail the fraudulent character of the sale, and praying that Lisberger, M. Rosenbaum, and the other sureties in the bond, which had been given as mentioned, should be made parties defendant.

This petition was ultimately directed by the court to be treated as a bill on the equity side of the District Court (*Lisberger v. Garnett*, 1 Hughes, 620), was referred to rules, and was then proceeded in as a plenary suit in equity, and not as a summary proceeding in bankruptcy.

The result of the litigation thus instituted was a decree of the District Court, made on the 10th day of May, 1876, pronouncing the sale of the stock of goods to Lisberger to have been fraudulent; and, inasmuch as they had been sold by Lisberger after delivery to him, fixing their value when received from Engel & Son at five thousand six hundred and eighteen dollars and fourteen cents; and decreeing the payment by Lisberger and his sureties to Garnett, assignee, of that sum, with interest from the 16th day of May, 1870, until payment and costs.

From this decree an appeal was taken by Lisberger to the Circuit Court of the United States for the district, on the 16th

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day of May, 1876, when he gave an appeal bond, with sundry persons, other than Rosenbaum, as sureties, in the penalty of nine thousand dollars, conditioned to prosecute an appeal with effect, or else to answer all costs and damages which the appellee might be decreed to pay.

On the 9th of October, 1877, the Circuit Court affirmed the decree of the District Court, and directed execution to issue as at law for the amount of the original decree; whereupon Lisberger took an appeal to the Supreme Court of the United States, giving an appeal bond, with sundry sureties other than those on the other two bonds, in the penalty of twelve thousand dollars. This appeal was dismissed from the Supreme Court at its October Term of 1878.

On the 13th of November, 1878, executions were issued against Lisberger upon the decree of the Circuit Court, upon which an aggregate sum of one thousand one hundred and eighty-five dollars and forty-eight cents has been realized, and from which it appears that Lisberger, who has since died, was insolvent. It is shown that he has no personal estate, and that he has real estate in the city of Richmond, though doubtless insufficient to satisfy the decree in favor of Garnett, assignee.

On the 17th of January, 1879, this assignee filed his petition in this court in the bankruptcy proceedings of *Storrs Brothers v. Engel & Son*, reciting the facts which have been detailed, and praying that M. Rosenbaum and the two sureties with him in the original delivery bond of the 18th of June, 1870, may be required to show cause here why they should not be ordered to pay the residue of the value of the stock of goods not satisfied by the executions mentioned, in accordance with their obligation given to this court as a condition of its surrender to Lisberger of the stock of goods in question at the date of this bond.

Rosenbaum demurred to this petition on the ground, *first*, that the proceeding should be a plenary suit at law on the bond, and that the defendant is not liable to be proceeded against by a summary petition in bankruptcy for a recovery upon the writing obligatory; and, *second*, that any proceeding on the bond should have made Lisberger, the obligor, who was living at the filing of the petition, a party thereto.

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The demurrer was overruled by the court, which held that the bond, having been given to the court itself, conditioned to abide its decree in the matter, no proceeding other than by motion or petition was necessary; and which also held that the bond being several, either obligor might be proceeded against severally, or together, as the plaintiff in the decree might elect.

Thereupon the defendant Rosenbaum filed his answer to the petition, resisting its prayer on various grounds, viz.:

1. That the order of seizure made on the 17th of June, 1870, by virtue of which the stock of goods was seized, and the bond for their forthcoming or the value of them given, was issued without authority of law, that the said seizure was illegal, and that the said bond so taken was taken without authority of law, and is in law null and void, and of no effect to bind the respondent.

2. That even if respondent were bound by said original bond, yet that he and his co-sureties were wholly absolved and discharged from all liability upon the same, by reason of the granting and allowance of the two appeals, which were taken by Lisberger, and the execution of two appeal bonds given thereon, to which bonds and proceedings this respondent was not a party; by which bonds and proceedings the responsibility for the said stock of goods was transferred to the sureties in the appeal bonds, who, respondent avers, were and are perfectly solvent, and liable in law to answer for the default of Lisberger.

3. That at the time that the decree of this court was pronounced declaring invalid the sale by Engel & Son to Lisberger of the stock of goods in question on the 16th of May, 1870, the said Lisberger was amply responsible, and had sufficient goods and estate to pay the said decree in full; that if Lisberger has become insolvent it was while the proceedings on said appeals were pending, and that the consequences of said insolvency cannot in law and equity be made to fall on this respondent, but should fall on those by whom said appeals were prosecuted and maintained.

4. That respondent is informed and believes that Lisberger died seized of valuable real estate in the city of Richmond; that the same ought to be sold in due course of law, and the net pro-

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Opinion of the court.

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ceeds applied in discharge, as far as it will go, of said decree; that until that be done there is no legal evidence of the insolvency of Lisberger, or the inability of his estate to pay said decree; that before this respondent can in law be held for this decree, the extent of the deficiency of the estate to pay the same should be first ascertained by such sale and application of its proceeds, in order that respondent may have the benefit of the same, and to this end.

5. That the personal representative of Lisberger should be made a party defendant to this petition.

E. Y. Cannon, for the defendant, cited *United States v. Kellogg*, 7 Wallace, 361; *Catlett v. Brady*, 9 Wheat. 553; 6 Gray, 141; 2 Gill & Johnson, 431; 6 Harris & Johnson, 431; *Hempstead*, 678, note; 4 Smedes & Marshall, Miss. 210; *Winston v. Rivers*, 4 Stewart & Porter, Ala. 269; 3 Washington C. C. 70; Powell on Appellate Proceedings, sec. 17, p. 275, and sec. 19, p. 371; *Nelson v. Anderson*, 2 Call. 242, 287 Mun.; *Cook v. Marsh*, 44 Ill. 178; *Patton v. Vially*, 1 Cranch, 463; *Mayo v. Williams's Administrator*, 17 Ohio, 244; *Gross v. Pearson*, 2 Patton & Heath, 483; and *Clarkson v. Read*, 15 Grattan, 288, 289.

John Howard and Robert Stiles, for the petitioning assignee, cited section 5024, Rev. Stat. U. S., at close of section, letter C; Bump, 447; Brandt on Suretyship and Guarantee, sec. 394, p. 535; *Dalby v. Jones*, 2 Den. 109; *Ashby v. Sharp*, 1 Littrell, Ky. 156; *Smith v. Falconer*, 11 Mun. 481, i. e., 18 N. Y. Sup. Ct.; *Hinckley v. Kreist*, 58 N. Y. 583; *Shannon v. McMullin*, 25 Grattan, 229, 230; *Miller v. Dowse*, 4 Otto, 444; and on the demurrer, *Taylor v. Carroll*, 20 How. 594; *Russell v. E. A. Co.*, 3 McNaghtun and Gordon, 104; *Freeman v. Howe*, 24 Howard, 457; 21 How. 506; 10 Wallace, 308; 1 *id.* 344-54; 1 Hughes, 634-59; *Inbusch v. Farwell*, 1 Black, 572; *Blossom v. Railroad*, 1 Wallace, 655; *Manufacturing Company v. St. Paul*, 2 Wallace, 634; *Wiswall v. Campbell*, 15 N. B. R. 421; 3 Otto, 351; *Smith v. Gaines*, 3 *id.* 342; and *Moore v. Huntington*, 1 Black, 572.

HUGHES, J.—The seizure of the goods in the possession of Lisberger was, after plenary proceedings in which both Lisberger

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and Rosenbaum were parties defendant, finally and solemnly adjudged to have been legal and proper; that is to say, the sale to Lisberger by Engel & Son was adjudged to have been fraudulent, null, and void. The seizure of these goods by the marshal under the order of this court was, therefore, a seizure of the assets in bankruptcy of Engel & Son, fraudulently held by Lisberger. Rosenbaum joined in the bond for the delivery of the goods, and for answering the decree of the court in the matter, and was party to the subsequent suit brought to test the validity of Lisberger's title to the goods.

Lisberger, for whom Rosenbaum became surety, has been the person who has prolonged the proceedings in the District, Circuit, and Supreme Courts, which delayed the court of bankruptcy in giving the order against his surety Rosenbaum, now asked for by the petition. The petitioning assignee has in no manner, direct or indirect, created any delay, or been guilty of any laches.

In the appeal from the decree of the District Court to the Circuit Court Lisberger was appellant. So also, from the affirming decree of the Circuit Court to the Supreme Court, Lisberger was appellant. In no instance and at no stage of these proceedings has the assignee Garnett committed any laches, or instituted any proceeding of a dilatory character.

It follows, now that the invalidity and nullity of Engel & Son's sale to Lisberger, and the fraudulency of Lisberger's original possession of the goods, have been finally determined, that the assignee, Garrett, is in equity entitled to proceed against the surety or sureties on either one of the bonds that have been given which he may elect to proceed against. He is not bound to begin with the sureties last responsible, and proceed with each set until he makes good his claim. He may begin with either surety or sureties. He has chosen to do so with the sureties in the first bond, and the court will sustain him in so doing and grant this petition; for that bond stands for the goods originally seized. *Inbusch v. Farwell*, 1 Black, 572.

The same principle applies to Lisberger's property. The assignee is not bound to await the result of the proceedings to subject Lisberger's property to the satisfaction of the claim of the

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assignee. The latter may proceed at once against Rosenbaum. I think this is in accordance with the equity of the case, and with the teaching of the authorities on the subject.

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*United States Circuit Court, District of South Carolina, at  
Columbia, December Term, 1877.*

EMANUEL WHITTLE v. FARMVILLE INSURANCE AND  
BANKING COMPANY.

Where a local agent of a fire insurance company, after a fire, made out and forwarded for the insured proofs of loss, not entirely in compliance with the requirements of the policy, and the company afterwards objected to paying but on other grounds than such irregularity in the proofs of loss:

*Held*, That the company thereby waived all objections on that score.

If the insured is in apprehension of a fire at the time of taking out a policy, but states that he is not, he is not entitled to recover on his policy.

If the insured grossly exaggerates the value of his property at the time of taking out his policy, he is not entitled to recover.

The burden of proof is upon the insurer to show violation of the conditions of the policy.

At the trial of this cause before a jury, at which the jury rendered a verdict for the plaintiff for the amount of \$2100 for damages by fire, with interest and costs, the court gave the following instructions or charge to the jury bearing upon the evidence in the cause:

BOND, J.—If the jury find from the evidence that the property mentioned in the policy of insurance was totally destroyed by fire, and that Whittle, the insured, within a day or two gave notice of its destruction to the agent of the company from whom he got his policy, and requested him to make out his proofs of loss, which the agent did, but not in conformity to the requirement of the policy; and if they find further that the agent

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Syllabus.

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wrote to the company stating what he had done, and asking the company to adjust and pay the loss, and that the company replied that they would adjust the same, and then stated what they would do, and that after the adjustment the insurance company refused to pay the loss on other grounds than the incompleteness of the proofs of the loss, and made no objection to them, then these are circumstances from which the jury may find that the company acquiesced in the sufficiency of the proofs, which, if the jury find, the informality of the proofs is not a bar to the plaintiff's recovery.

If the jury find from the evidence that at the time of his application for the policy in evidence, the plaintiff Whittle was in apprehension of incendiarism, and represented in his application he was in no apprehension of incendiary fire, then he is not entitled to recover.

And if the jury find from the evidence that the plaintiff in his application for insurance and notice of loss grossly exaggerated the value of the property insured or burnt, then he is not entitled to recover.

The burden of proof is on the insurance company to show violation of any condition in the policy set up in the answer.

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*Circuit Court of the United States for the Eastern District of Virginia, at Richmond, Spring Term, 1874.*

IN RE JOHN F. TALIAFERO, A BANKRUPT.

Any creditor holding a lien upon lands of the bankrupt may appeal from a decree affecting his rights to the supervisory jurisdiction of the Circuit Court. Before lands of bankrupt covered with liens can be sold free of liens by the bankruptcy court, all liens and their priorities must be definitely ascertained after personal notice to lien creditors; otherwise the lien creditors not bound.

Where other courts have taken full jurisdiction of property on which liens are asserted, the bankruptcy courts should in general not interfere.

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Opinion of the court.

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NOTE.—This decision was rendered before the passage of the Revised Statutes of the United States, on June 20th, 1874, containing section 711, *sixth* clause; operating in connection with section 4972, clause *third* and *fourth*.

PETITION for review under the second section of the Bankrupt Act.

*L. L. Lewis, for the assignee.*

*John Hunter, for a lien creditor, appellant.*

WAITE, C. J.—Previous to the year 1870, judgments to a large amount had been rendered against Taliafero, the bankrupt, which were liens on his lands. During that year the present petitioners, being part of the judgment creditors, filed a bill in the Circuit Court of Orange County, praying a sale of the lands to pay the judgments. Upon this bill such proceedings were had that, on the 3d day of October, 1872, that court rendered a decree, confirming the report of a master to whom a reference had been made to ascertain the liens and their priorities, and appointing certain commissioners to sell the lands on the premises, at public auction, to the highest and best bidder, after notice of the time and place of the sale, for at least thirty days, by publication in such paper or papers as the commissioners should select, and by printed handbills posted on the front door of the court-house, and in three other public places in the county. The commissioners were also authorized, at their discretion, to sell the property at private sale, and upon the following terms, to wit, cash in hand sufficient to pay all costs and the expenses of the sale, and the residue in five equal annual instalments, the purchaser giving bond with approved security for the deferred payments, and the title to be retained until the final payment was made. They were also authorized to sell the property as a whole or in parcels, as they should think most judicious. The amount of the liens, as reported by the master, exceeded \$12,000, with interest to be added from August 20th, 1870. The proceeds of the sale when made were to be applied to the payment of the lien debts in the order of their priority.

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Opinion of the court.

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Taliafero was adjudged a bankrupt on the 9th June, 1870, upon his own petition. An assignee was appointed on the 14th July.

On the 16th September, the assignee filed his petition in the District Court, as follows:

TO THE HONORABLE, ETC.

The petition of, etc., assignee, etc., respectfully represents that a certain portion of said bankrupt's estate, to wit, a tract of several hundred acres of land lying in said county of Orange, is surrendered by him as forming a part of his assets, and as such assigned by this court to your petitioner; that it is averred that certain liens affect such property, but as no evidence of this fact appears upon the proceedings, your petitioner believes it will be for the best interests of the whole creditors that said property be sold at public auction under an order of this court, and that the liens, if any exist, be under said order transferred from this property to the fund released.

Wherefore, your petitioner prays that an order of court may be made, authorizing a meeting of the creditors of said bankrupt, to be held in terms of Rule XVII, of "General Orders in Bankruptcy," and for the purposes herein stated.

Signed by the assignee and sworn to.

Upon the filing of the petition the district judge (Underwood) made the following order:

ALEXANDRIA, VA., September 17th, 1873.

It is ordered that the petitioner be and he hereby is authorized to call a meeting of the creditors of John F. Taliafero, bankrupt, to be held in the office of the register in bankruptcy at Richmond, on the 25th day of October, 1873, at ten o'clock A.M., that cause be shown why the prayer of this petition should not be granted. And it is further ordered that he shall publish notice of said meeting in the State Journal, and that he shall also serve notice by mail on all known lien creditors.

(Signed)

District Judge.

It nowhere appears from the papers or proofs that the notice required by this order was given, but we assume that the proper publication in the newspapers was made, and it is stated by the petitioners themselves in their petition for this review, that they and other judgment creditors appeared before the register on the day appointed for the meeting, and objected to a sale of the

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property by the assignee. In support of their objection they exhibited, as they claim, a copy of the decree of the Circuit Court of Orange, and of the report of the master on which it was predicated.

On the 19th February, 1874, the register made the following report :

RICHMOND, VA., October 25th, 1873.

I, etc., register in bankruptcy for the Eastern District, do hereby certify that on the 25th day of October, 1873, I held a meeting of the creditors of said John F. Taliafero, bankrupt, and that cause was shown against the sale of the within-mentioned property, but the register is of the opinion that no sufficient reason has been shown why the court should not order the sale.

Signed by the register.

February 19th, 1874.

Upon the filing of this report, and on the same day, the district judge made the following order :

RICHMOND, VA., February 19th, 1874.

In respect that the order of this court of September 17th, 1873, has been complied with, and the meeting of parties interested in the estate of \_\_\_\_\_, bankrupt aforesaid, has been held, and no sufficient cause having been shown why the prayer of the petition of the assignee aforesaid should not be granted, it is ordered that the said, etc., assignee, be and he is hereby authorized and empowered to sell the property of said bankrupt by public auction, as follows, to wit, in whole or in parcels, as may seem best: 1st. That the day and place of sale shall be advertised twice a week for three weeks in the State journal published at Richmond, and by placards posted at three or more public places in the county in which such property is located. Sale to be made on some county court day at the courthouse of Orange County, Va. 2d. That the terms of sale shall be one-fourth cash, and the balance on credit of twelve and twenty-four months, with interest at the rate of six per cent. per annum, the purchaser to give notes with approved security for the deferred payments, and the title to be retained by the assignee until said notes are paid. 3d. The assignee to report his proceedings to this court immediately on completion of the sale.

Signed by the judge.

Important interests, such as are here involved, ought not to be dealt with in this summary manner. An assignee in bankruptcy is especially the representative of the unsecured or general

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creditors. He is in no respect the agent or representative of secured creditors, who do not prove their debts. He cannot deprive them of the benefit of their securities. His only interest is in what remains after the secured debts are paid. If the security is not more than sufficient to pay the debt he ought not to interfere with it.

Whenever he invokes the action of the bankrupt court in respect to such property it should be by petition, setting forth the facts. He should describe the property and the incumbrances, so far as they can be ascertained by an examination of the public records, or in any other manner by the exercise of reasonable diligence. All parties, whose names are known, or whose interest appear of record, should be summoned, or in some form notified to appear and answer the petition. Their rights may be affected by the order that is to be made. They should, therefore, be permitted to have their day in court and to speak in their own behalf.

The action of the court should be such as, having due regard to the rights of the secured creditors, will best promote the interests of the unsecured. A sale ought not to be ordered free of incumbrances, unless it is reasonably certain that the proceeds will be more than sufficient to discharge the liens. Especially should this be the case where the secured creditors oppose the order, and have themselves asked the interposition of a court of competent jurisdiction in their behalf, and obtained a decree for a sale upon terms which in their judgment will best promote their interests. The court should, therefore, be accurately informed as to the facts before it is called upon to make any order.

This cannot operate to the injury of the assignee or those whom he represents. He can, if proceedings have already been commenced by the creditor, ask to be made a party in the place of the bankrupt, and thus be put in a condition to avail himself of all the powers of the court in which they are pending that may properly be exercised in his behalf. If unwilling to do this, he may at any time sell the property subject to the incumbrances, or he may himself commence proceedings in the bankrupt court to marshal the liens, and obtain a sale under the control of that court. All that is necessary for that purpose is that he make all

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lienholders and incumbrancers party to such proceedings, and have their rights settled in the court before which he calls them. If disputes arise as to the amount or validity of liens they can be settled and adjusted there, and, when settled, the court can act intelligently with a view to the promotion of the interests of all parties. If the assignee does not wish to move himself, he may wait until the creditor proceeds. To any such proceeding he will be a necessary party, and, being a party, can see that those whom he represents are properly cared for.

The assignee ought not to invoke the action of the court until he has informed himself, as fully as he can, of the actual condition of the property. He is in one sense an officer of the court. He was appointed to manage the estate, and to dispose of it for the benefit of those who have submitted their interests in its distribution to the protection of the court. His duty is to advise the court of the facts, in order that it may act understandingly in the execution of its trust.

It is perfectly certain, that when the district judge made the order complained of in this case, he had no knowledge of the actual condition of the liens upon the property or of the rights of the parties to be affected by the sale. He had before him no means whatever of determining for himself, whether or not it would be for the interest of the unsecured creditors that a sale should be ordered free of incumbrances, or whether such an order would affect injuriously the rights of others. He relied, as under ordinary circumstances, in the absence of opposition, it was proper he should, upon the information furnished by the assignee and the report of the register.

The petition presented by the assignee for the allowance of the order contained only the most general statements. It did not even describe the lands, much less the incumbrances as they existed or appeared to exist. Not a single lienholder is named, and it is in terms stated that the proceedings in the bankrupt court, up to that time, furnished no evidence of the condition of the liens. The assignee asked, however, that a meeting of the creditors might be called to show cause, if any they had, why the court should not grant the prayer of the petition.

Under the order of the court this meeting was held, but the

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Opinion of the court.

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creditors who alone could act (those who had proven their debts) made no attempt to ascertain the condition of the property. In fact it may fairly be inferred that they were unwilling to do so. In the answer filed with us, it is said that certain of the secured creditors did appear and state *verbally* that such a decree as is now shown had been rendered, but that no sufficient evidence of that fact was filed. This statement, whether properly sustained by the proof or not, was sufficient to put those who were acting in the premises on inquiry. Information as to the existence of the records and the place where they were to be found was then given. The meeting was held on the 25th October, but the report was not made until the 19th February following. In the meantime no new showing was made. The report when made was as general as the petition. It does not even state that any objection had been made to the sale, or that the attention of the register had been in any manner called to the proceedings in the State court. It is claimed that no objection was made to the order on the hearing before the district judge. But this objection ought not to influence us in sustaining the order, since it was made immediately on the filing of the report and without notice.

It is also urged that a part of the lien debts have been paid, and that this can be made to appear if opportunity is given. So, too, it is said that the interest which accrued upon the lien debts during the war was included in the judgments upon which the decree is predicated, and that it would be unjust and unfair to compel the unsecured creditors to go before the State courts to have these and other questions settled. All this would be very proper for the consideration of the assignee when determining whether he ought in justice to those whom he represents to proceed in the bankrupt court to have the rights of the several parties determined, but so far from influencing the court to make an order of sale free of incumbrances without inquiry as to the facts, it ought to have caused it to refuse such an order until all such questions were settled.

Again it is said that only \$2000 of the lien debts have been proven against the estate. A failure to prove the debt does not affect the lien. The debt is still in force against the property, although it may not be entitled to a dividend from the general

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fund. If it exists in fact, it must be considered by the court in all matters connected with the security which it holds.

It is further insisted that one of the petitioning creditors has not proven her debt against the estate, and, for that reason, she cannot call upon this court to act under its supervisory jurisdiction.

The supervisory power of this court is not confined to the petitions of creditors who have proven their debts. The language of the second section of the act is, "shall have general superintendence and jurisdiction of all cases and questions arising under this act." All persons, therefore, parties to, or affected by, any proceedings under the bankrupt jurisdiction of the District Court, may invoke the supervisory powers of this court. Creditors who have proven their debts are, in effect, parties to all proceedings, and are always supposed to have an interest in all that is done. Whenever they appear, therefore, they are recognized in their character as creditors, and entitled to consideration as parties. If one who has not proven his debt appears, and asks relief, he must aver and establish his special interest in the matter to be revised. That being done he is entitled to a hearing.

These petitioners have established such a special interest. The district judge ordered that all lienholders should be notified to appear and show cause why the prayer of the petition of the assignee should not be granted. The petitioners were lienholders. They were, therefore, proper persons to appear in the District Court. They did appear, and become parties to the proceeding, although not named. Their interests are directly affected by the order which has been made, and they may ask to be relieved against it.

The order of the District Court is reversed. If the assignee still considers that it will be for the interest of the general estate to have a sale of the property free of incumbrances, he can commence his proceeding again, making the necessary parties, and, upon a proper showing, obtain his order. All we decide now is, that upon the petition in its present form, and with the showing that has been made, the order of the 19th February ought not to have been passed, and we are satisfied that if the district judge had known the facts disclosed in the petition and answer filed

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with us at the time he made his order, we should not have been called upon to revise his action.

Judge Bond concurs in this opinion.

Some months previously to this decision of the Chief Justice, and but a few weeks after Judge Hughes came upon the bench, he had established as rules of practice in bankruptcy the following regulations (See 2 Hughes, 554 and 555):

Petitions by assignees or creditors to sell real estate free from incumbrances, and to transfer the liens from the realty to the fund in court, shall be filed before the court, and an order to show cause may be issued notifying all creditors claiming liens on the said real estate to appear before the register on some day in such order named. A copy of such order shall be served on each of the creditors at least ten days before the day of appearance, unless notice by publication or mail be ordered by the court, instead of personal notice.

Sales of real estate free from all incumbrances will not be ordered unless all liens on the property shall have been previously ascertained, with their priorities, etc.

Some months before the foregoing decision was rendered *In re John F. Taliafero*, the judge of the District Court had rendered the decision which is given in the following case:

*United States District Court for the Eastern District of Virginia,  
at Norfolk, April Term, 1874.*

IN RE JOHN ADDISON, JR.

The bankruptcy court has exclusive jurisdiction to liquidate the liens upon a bankrupt's real estate; but whether it will exercise this jurisdiction in any case is a matter for its own discretion, and this discretion must be exercised by the court itself, and cannot be delegated to or assumed by the register.

It is irregular to undertake to sell real estate free of incumbrances until all liens and their priorities are fully ascertained.

IN bankruptcy.

The case as shown by the record is as follows:

John Addison, Jr., the present bankrupt, by the partition of his father's real estate, became the owner of a tract of land situ-

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ated in Northampton County, Virginia. Under the decree of partition liens were retained for owelty of partition in favor of the estate of Edward V. Addison for \$895, Bettie E. Fisher for \$198.33 $\frac{1}{2}$ , and William R. Fisher for \$420 upon the tract called Grapeland, which was assigned and set apart to him.

In January, 1866, the said Addison conveyed to Mrs. E. A. Turner, by mortgage deed, this tract of land, subject to the aforesaid liens for owelty of partition, to secure a loan of \$4530.86, with interest thereon at the rate of six per centum per annum. In 1872 Mrs. Turner brought her suit on the chancery side of the Circuit Court of Northampton County for a foreclosure of her mortgage and a sale of the mortgaged premises. In 1873, before a sale could be had under decree of the State court, Addison took the benefit of the Bankrupt Act, and thereupon all proceedings in the suit instituted in the State court were suspended. Edward D. Pitts, one of the petitioners, was appointed assignee of said bankrupt, and upon his petition an order of sale of the said tract of land was made by the District Court of the United States at Norfolk. In August, 1873, the land was sold by the said assignee and purchased by Mrs. Turner at the price of \$5500. The sale was reported by the assignee to the register and approved by him, and he proceeded to ascertain the liens and their priorities upon the fund, in the hands of the assignee, arising from the sale.

Upon the coming in of the register's report, ascertaining the liens and their priorities upon the said fund, Mrs. Turner excepted to the same upon the following grounds: 1st. Because out of the fund arising from the mortgaged subject, E. P. Pitts, a creditor, was allowed the sum of \$125.90, with interest, and the said sum given priority over her debt secured by mortgage. 2d. Because John Addison, Jr., the bankrupt, was allowed \$525.39 with interest, out of the said fund, and the said sum given priority over her debt secured as aforesaid; and 3d. Because T. C. Walston, assignee in bankruptcy of John Addison, Sr., was allowed the sum of \$184.77, with interest, out of the sale of the land on which she held a mortgage. The court sustained each and all of these exceptions, and directed the assignee to pay: 1st. The liens for owelty of partition; and, 2d. The balance of the money in his

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hands from the sale of the said tract of land over to Mrs. E. A. Turner. E. D. Pitts, the assignee in bankruptcy, and Walston, assignee in bankruptcy of John Addison, Sr., did not ask the action of the court below to be reviewed. But E. P. Pitts, the creditor, petitioned for a review. The claim of this petitioner was a judgment obtained in the Circuit Court of Northampton County in November, 1872, by John Addison, Jr. (now bankrupt), against W. R. Fisher, and assigned by Addison before his bankruptcy to E. P. Pitts. At the time of the assignment of this judgment by Addison to Pitts, Addison was largely more indebted to Fisher than the amount of the judgment recovered against Fisher and assigned to Pitts. Upon this judgment thus assigned, Pitts caused an execution of *fiери facias* to issue against the goods and chattels of Fisher. Fisher enjoined in the State court the collection of this judgment for \$125.90, and upon a hearing of the case the injunction was perpetuated and the judgment of \$125.90 was, by the decree of the said Circuit Court, directed to be applied as a payment *pro tanto* upon the amount due Fisher by Addison, as an equitable set-off. See *Wayland v. Tucker et al.*, 4 Gratt. 267.

That court held that Pitts was substituted to the rights of Addison by the assignment of the judgment, and took the judgment subject to be set-off against Fisher's unsatisfied lien for owelty of partition, and to be extinguished by that lien. It was so ordered by a decree of a court of competent jurisdiction, and the subject was *res adjudicata*. But the register in bankruptcy overruled this adjudication of the Circuit Court, and allowed this judgment, which had been thus satisfied, priority over Mrs. Turner's debt, and directed the assignee to pay it a second time out of the money in the custody of the court. Upon exception, the District Court reversed the register.

Upon this ruling of the District Court E. P. Pitts, the creditor, appealed to the supervisory jurisdiction of the Circuit Court, which affirmed the decree of the District Court. The following was the decision of the District Court, rendered by

HUGHES, J.—This bankrupt's farm, in Northampton County, worth some \$6000, was incumbered by undisputed owelty and

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Opinion of the court.

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mortgage liens to the amount of about \$9000. The register, B. B. Foster, ordered the land to be sold free of incumbrances, before any previous ascertainment of liens and their priorities. The sale was made by the assignee, E. D. Pitts, and duly reported. The register confirmed the sale. The register then drew up a report of the liens upon the land, and of their priorities. Exceptions were taken to this report by the mortgagee and principal lienor, Mrs. Elizabeth A. Turner. On these exceptions the case comes for the first time before this court since the order of reference.

These proceedings seem to require an announcement of the principles which will govern the court in dealing with real estate incumbered by liens equal to, or exceeding its value, where the probability is small of the bankrupt's estate having any interest in a surplus, or equity of redemption.

Since Judge Story's decision in the case of *Christy*, reported in 3d Howard, the very language of which is embodied in the jurisdictional clauses of the general Bankrupt Act of 1867, no doubt has been entertained of the power of a bankruptcy court of the United States to control the entire estate of the bankrupt, both contingent and actual, whether it be not or be the subject of litigation in other courts, and in whatever stage of litigation. Whether, therefore, a bankrupt court will exercise its jurisdiction over such part of the bankrupt's estate as may be the subject of litigation in other courts, or be covered by liens equal to or exceeding its value, is not a question of power and right, but only of discretion.

For obvious reasons the bankrupt court must reserve to itself, in every case, the decision of the question whether or not it will exercise this discretion. And, therefore, no assignee of a bankrupt can have power to sell real estate, which is subject to liens, free of incumbrances, without a special order of court. The register has no power to confer such authority. It can come only from the court itself. The exercise of this authority involves considerations of great delicacy ; inasmuch as it often produces a conflict of jurisdiction with other courts. The idea is not to be tolerated that any but the court itself may assume to exercise a discretion so important and so responsible. This dis-

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cretion, reposed by law in the bankrupt court, cannot be delegated by it, either by general rule or special order, to either the assignee or the register; much less can the discretion be assumed by either of those officers. Rule 38, of the series of rules adopted by this court on the 21st day of September, 1869, cannot logically, and must not in fact be construed to delegate such a discretion; nor does the order (form No. 4) of reference to the register intrust to that officer the exercise of such a discretion.

In the exercise, itself, of this often delicate discretion, this court will not interfere with trustees or local courts in their proceedings to subject real estate to unquestioned liens, where there is little probability of a surplus or of an equity of redemption resulting to the bankrupt's estate; but the court will content itself with requiring the assignee to become party to suits or to trustee's sales. Where there is nothing to be sold that is likely to be available to the assignee, any action of this court for the liquidation and settlement of such liens and for the sale of property subject to them, would cause a useless expense both to the lienors and the bankrupt's estate, producing nothing. Interference of this unavailing character, besides being futile of any good to the bankrupt's estate, would unnecessarily take away from the persons really interested in the land the right of having their liens adjudicated by the courts of the counties where they reside and where the property subject to the lien lies—a right which is not lightly to be disregarded.

I am, therefore, free to say, that if this matter of the Grapeland farm, or John Addison, Jr., bankrupt, had come before me in its inception, I should not have interfered with the proceedings of the Circuit Court of Northampton County, looking to a foreclosure of the mortgage of Mrs. E. A. Turner, and to a settlement and discharge of the owelty and mortgage liens resting upon that farm, it being confessedly worth less than \$6000, and those liens amounting to \$9000. There was plainly no possibility of a resulting surplus or equity of redemption to the bankrupt's estate; no possibility of any tangible interest having passed, under the operation of the 14th section of the Bankrupt Law, to the assignee. But finding the case here, as I do, under these circumstances, and those who would have a right to complain of its

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Opinion of the court.

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having been brought here being willing now to acquiesce in the action of this court, I will give to the matters before me such adjudication as seems proper.

I am to pass upon the exceptions which have been taken by the mortgage creditor, Mrs. E. A. Turner, to the report and orders of the register of the 11th and 14th of October, 1873.

1st. Her first exception is to the register's allowance of the claim of \$125.90 to E. P. Pitts in the form of a judgment in favor of *John Addison, Jr.* (now bankrupt), v. *W. R. Fisher*, one of the owelty lienors, which was assigned to Pitts before the bankruptcy. It is conceded that as against Fisher this judgment is extinguished, it having been subject to the right of set-off which Fisher had against Addison for an owelty lien of \$420 on the Grapeland farm; a court of competent jurisdiction having decreed that it should be applied as a credit upon that owelty debt due Fisher. This decree of the local court was rendered on the principle that the equity of Fisher was superior to that of Pitts. But it is claimed that Pitts was substituted somehow to the rights of Fisher, and stands in Fisher's shoes as a lienor, to the extent of his judgment, against Addison's land, which he had mortgaged to this exceptant. It is not shown how this substitution has taken place. Pitts has no other rights than Addison himself could have had if the judgment had not been assigned. By the transfer he was simply substituted to the rights of Addison. He took the judgment subject to its liability to be set off against Fisher's owelty claim, and to be annulled and extinguished as a part of that lien. It was thus annulled by decree of the local court. As a lien it is *res adjudicata*. Pitts's recourse is against Addison, or his estate, of which he is only a general creditor. His equity is for compensation out of that estate. Mrs. Turner's equity as to her debt is for payment out of the estate generally, and out of the mortgage subject especially, after the unpaid owelty liens have been paid. Pitts is only a general creditor. Mrs. Turner is a general and a lien creditor, and her equity is superior to that of Pitts. The exception to this allowance out of the mortgage fund must therefore be sustained, and the allowance disapproved.

2d. This mortgagee's second exception must be sustained upon a somewhat similar ground. The bankrupt, John Addison, Jr.,

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Opinion of the court.

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was a devisee of Joseph W. Addison before the partition which gave Grapeland to John in his own right and as Joseph's devisee, subject to owelty liens, and also, as to Joseph's interest, subject to the general debts of this devisor. Shortly after the partition, and after coming into possession of Grapeland, he mortgaged the farm for a debt to Mrs. Turner, conveying all his right, title, and interest, individually and as devisee, to her with general warranty. By transactions which need not be recited, John Addison, Jr., himself, afterwards and before his bankruptcy, became the holder of a debt against Joseph's estate, for which the register now allows him \$525.39. This debt was also allowed on some undefined doctrine of substitution. By taking in this debt of Joseph Addison and becoming himself its owner, John's mortgage deed became operative against it in his own hands. Mrs. Turner's equity against it as his property, under his own mortgage deed, is certainly superior to any equity he may have against her; and the register's allowance of this \$525.39 to Addison, as an exemption, cannot be approved.

3d. The mortgagee's third exception is to the register's allowance of \$184.77 to Thomas C. Walston, assignee in bankruptcy of John Addison, *Senior's*, estate, as a general creditor of Joseph Addison, deceased, devisor of John Addison, Jr. As a claim in prejudice of Mrs. Turner's mortgage lien, the allowance cannot stand. John Addison, Jr., took Joseph's interest in Grapeland as devisee as early as the fall of 1865; and he mortgaged his whole interest to Mrs. Turner in 1866 by recorded deed. As late as November 4th, 1873, the clerk of the County and Circuit Courts of Northampton County certified that there had been no qualification on the estate of Joseph Addison, deceased, and no fiduciary accounts; that no classified account of debts was ever returned to the clerk's office of either of the courts, and that no suits were brought or were pending in said courts for the settlement of the estate. The *bona fides* of the mortgage deed is not questioned, and section 5, chapter 127, page 934, of the Code of Virginia, provided that the *bona fide* conveyance by a devisee of real estate shall be good against creditors of the estate in cases where, at the time of such conveyance, no suit shall have been commenced for the administration of assets, nor any reports

Brief for defendant.

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have been filed of the debts and demands of those entitled. The representative of Addison, Senior, therefore claiming upon a debt of the deceased devisor, chargeable against his devisee, cannot make good his claim against the mortgagee of Grapeland, an innocent purchaser, without notice, and he ranks only as a general creditor of this bankrupt. The allowance to Walston is disapproved.

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*United States Circuit Court, Eastern District of Virginia, at  
Richmond, July, 1879.*

WILLIAM P. DAVIS, ASSIGNEE OF SLOMAN DAVIS, v. THE  
NEW YORK LIFE INSURANCE COMPANY.

The Supreme Court of the United States in the case of *The New York Life Insurance Company v. Statham*, 3 Otto, 24, merely declared as a principle of law that the Southern holders of Northern policies of life insurance which lapsed during the civil war by default in paying the annual premiums, were entitled to the "equitable value" of their policies, as of the date of the first default in paying the premiums, and did not undertake to set out the data or prescribe the process for ascertaining that value, but left the whole subject to be determined by the jury or chancellor in each case.

Where a jury, after a fair trial and full argument, upon intelligent and competent testimony, finds a verdict in such a case which does not seem grossly excessive, or plainly disregarding of the law, the court will not set such verdict aside.

UPON a motion for a new trial.

Brief of counsel for the defendants, W. W. Old and C. W. Williams:

The jury in this case rendered a verdict for the plaintiff for \$1615.47, with interest thereon from April 17th, 1865, till paid.

This verdict was rendered in response to a claim on the part of the plaintiff for the *equitable value* of a certain policy for \$10,000 on the life of Sloman Davis.

This policy was issued December 28th, 1857, and the annual

Brief for defendant.

premium was \$627, of which 60 per cent. was paid in cash and a note was given for 40 per cent. thereof.

The premiums on it were paid when they fell due in the years 1858, 1859, and 1860, but in 1861, when the premium fell due, it was not paid, but under a claim that it had *been tendered*, a suit was brought which went to the Supreme Court of the United States, and a report of the case is to be found in 5 Otto, 425.

Under that decision the policy *lapsed* on December 28th, 1861, and the insured was entitled to the equitable value thereof on that day as announced in the case of *Insurance Company v. Statham et al.*, 93 United States Rep. 24. (3 Otto.)

The question before the jury which rendered the verdict complained of was, what was the equitable value of the policy on December 28th, 1861. That was the only subject of inquiry.

There was no denial on the part of the company of the right of the plaintiff to recover this *equitable value*, the only question presented was the *amount* which he was entitled to as this *equitable value*.

The insured had paid in premiums <i>in cash</i> from December 28th, 1857, up to December 28th, 1860, the date of the last payment made, the sum of . . .	\$1504 80
And he had paid in interest on his notes given for 40 per cent. of the premium,	
In 1858, . . . . .	\$15 08
In 1859, . . . . .	30 16
In 1860, . . . . .	45 24
	90 48
Making the aggregate of the <i>cash</i> paid in up to the time the policy lapsed, the sum of . . . . .	\$1595 28

He had given his four notes, each for the sum of \$250 80 and these on the date of said lapse amounted to the sum of . . . . .	\$1003 20
And interest, one year, at 6 per cent., . . . . .	60 18
	\$1063 38

But the jury rendered a verdict for \$1615.47, with interest thereon from April 17th, 1865, the principal being for \$20.19 more than *all the cash* ever paid into the Company by the insured, without any regard to the *value* of the insurance on the life in question from December 28th, 1857, to December 28th,

## Brief for defendant.

1860, which must have been considerable considering the age of the insured, and without any regard to the *notes* which had been given in part payment of the premiums, and were still held by the company.

They rendered their verdict upon the supposition, in their own view of the case, that the whole of the premiums had been paid in *cash*, of which the contrary is the fact, so that the equitable value of this policy as the jury fixed it amounts to :

Their verdict, . . . . .	\$1615 47
The notes which they refused to deduct, and interest one year, . . . . .	1063 38
	<hr/>
	\$2678 85

Which is nearly double the amount actually paid in by the insured, without any regard to the *value* of the insurance for the four years during which this policy of \$10,000 was carried on a person 57 years of age.

Surely this statement, made partly *arguendo*, itself shows that the verdict of the jury is not right.

The way in which the jury arrived at the amount of their verdict may be seen by the calculation which they made and which is filed with the papers in the cause.

They took the insurance on the life of a person of the age of 61, as given in certain tables in a book which was admitted as evidence, . . . . .	\$819.60
And the cost of insurance, age 57, from the same book, .	662.90
	<hr/>
And subtracted the two, getting . . . . .	\$156.70
And this they multiplied by . . . . .	10.309
the present value of \$1, age 62, American tables,	<hr/>
	140960
	47070
	15670
	<hr/>
	\$1615.47

In this multiplication they made a mistake of a few cents, as may be seen by a correct multiplication, but there is no doubt but that they arrived at their verdict in that way.

## Brief for defendant.

We insist the verdict is erroneous and should be set aside for the following reasons, as they occur to us, among others :

1. The *basis* of ascertaining this equitable value was not the correct one.

In *Insurance Company v. Statham et al.*, 3 Otto, 24, the court, in the last sentence of Mr. Justice Bradley's opinion, lays down the rule that "*in each case the rates of mortality and interest used in the tables of the company will form the basis of the calculation*" of this equitable value.

The tables which were introduced in evidence, and which we as counsel for the insurance company objected to, were not the tables used by the company at the time the insurance in this case was effected, nor were they in use at the time the policy *lapsed*. This is shown by an examination of the tables themselves, by what we know as internal evidence. On page 19 of this book we find that the annual premium on \$1000, age 57, is \$66.29, and therefore on \$10,000 is \$662.90, whereas the annual premium on the policy on Davis's life, age 57, as shown by the policy itself, is \$627, a difference of \$35.90.

But we are not in want of direct evidence on this point. Mr. Moore, who was introduced as a witness by the plaintiff for the purpose of proving that this book was used by the company, also stated that while the book had been in use for some years past, still there had been a *change* in the rate tables, but what that change was he could not say ; and Professor Smith, also their witness, stated that the insurance on Davis's life was not *according* to those tables.

These tables, then, were not in fact proper evidence before the jury in this case for the purpose of giving them the data for calculating this equitable value ; and it is not enough for the learned counsel for the plaintiff to reply that *we* must produce these tables. He has not called for them nor any other evidence in our possession. It was the plaintiff's part to produce evidence. He cannot shield himself by saying this was an *insurance company*. He could have gotten from this company any facts or data in their possession by the mere calling for them.

The fact is that the premium paid by Davis in 1857 was upon the basis of *Carlisle's tables*, as may be seen from an examination

Brief for defendant.

of them. From those tables the insurance at 62 (age) would be for \$10,000 the sum of \$725, leaving a difference of \$98, which multiplied by \$10,398, the value of an annuity of \$1, age 62, gives \$1055.81, as the reserve fund ; the fund spoken of by the learned justice in *Insurance Company v. Statham et al.*, 3 Otto, 24. Professor Smith stated in his examination that upon the basis of a premium of \$627 on \$10,000, age 57, he could not tell without his book, or a long and tedious calculation, what would be the premium on the same amount, age 62, but *guessing* at it, said it would not be more than \$777.50. Even upon this basis the value of the policy would have been only \$1551.50, which according to our views is the most that could be claimed by the plaintiff, from his own evidence, on the supposition that the whole premium had been paid in cash, and that the *guessing* at the amount of premium was sufficient when it was in the power of the plaintiff to get the exact figures.

2. But the verdict is erroneous on another ground already intimated.

In *Insurance Company v. Statham et al.*, 3 Otto, 36, the court say, towards the close of Mr. Justice Bradley's opinion : "And the value," that is, the equitable value, "should be taken as of the day when the *first* default occurred in the payment of the premium by which the policy became forfeited."

The *first default* occurred in this case on December 28th, 1861, and the equitable value of this policy as of that day, with interest thereon from the close of the war, the plaintiff is entitled to recover.

Now after estimating in their own way this equivalent value, the jury failed to deduct the notes which had been given for 40 per cent. of the premium on this policy, which they had already taken to have been paid. This would have made the verdict :

Amount of verdict rendered, . . . . .		\$1615 47
Less notes held by company given for 40 per cent. of premium, 4 notes of \$250.80 each, . . . . .	\$1003 20	
Interest thereon one year, . . . . .	60 18	1063 38
		<hr/>
		\$452 09

and we submit that at most the plaintiff should be put upon terms to give this credit now, or else have the verdict set aside.

It is no answer, in our view, to this proposition, to say that *these notes were paid by dividends*. There was no proof of any such fact, and no evidence tending to *prove* it. There was evidence about the dividends declared from year to year in late years by the company, but there was *no evidence* that up to December 28th, 1861, any dividends had been declared, and certainly it was in the power of the plaintiff to ascertain this fact specifically. The company could hardly suppose that in determining a case of this kind, where the principles for ascertaining the value are distinctly laid down, that the plaintiff would be allowed to speculate before a *jury* about the value of a policy, with no limit short of his own expanded expectations, and therefore may not have been prepared with all the *documents* necessary to rebut the evidence and theories propounded; nor do we understand that in this case such a course will yet be allowed, for as we understood the court the questions about the evidence introduced, raised by the company's counsel, were reserved by the court to be considered upon a review of the verdict of the jury after argument. Some of those questions were worthy of consideration, and we have no doubt when the court has given that which they deserve, it will say that much of the evidence introduced by the plaintiff on this issue was *improper* and *irrelevant*, that it was in a degree merely *speculative*, and in no instance was the *best* evidence which the party making out his case is always *bound* to produce, even though it may be in the possession of an *adverse* party; and for procuring this evidence the law affords ample and ready means. In this case there did not appear any disposition on the part of the company to withhold anything; it did not appear that any effort of any kind was ever made by the plaintiff to get any information necessary for the formation of this verdict, which had proved unsuccessful.

3. We say in conclusion that this is a case in which it is eminently proper that the court shall review the verdict of the jury, and in doing so the court could not possibly invade any of the rights which belong to the jury. The verdict was simply the result of a calculation, based upon certain premises or data.

Brief of counsel for the plaintiff.

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There were only two matters to be considered : 1st, the premises ; and 2d, the calculation. The court was to see that the jury had the proper *data*, and the calculation was simple enough. The only other question in this case was the question of set-off, already fully considered.

Respectfully,

WILLIAM W. OLD,

June 29th, 1879.

Of counsel for defendant.

As a matter of interest to the judge, I beg leave to hand him a letter from Mr. Been, the company's vice-president and actuary, which may be taken for what it is worth. It was in reply to my letter giving him a statement of the facts of this case as proved on the trial, and the manner in which the jury arrived at their verdict.

WILLIAM W. OLD.

BRIEF OF COUNSEL FOR THE PLAINTIFF.

Samuel B. Paul and Samuel D. Davies, in reply to defendant's brief in support of his motion, states that the only subject of inquiry by the jury arising out of the declaration is, what was the equitable value of the policy December 28th, 1861.

He introduced another subject, to wit, certain set-offs of notes made by the assured in partial payment of premium. To this we responded, our interest as participants in the surplus of the company.

There was thus another subject before the jury, which was properly considered on evidence and after argument.

Defendant admitted that the insured was a participant in the surplus of the company.

The evidence introduced was addressed solely to these two points.

The second does not show, nor as matter of fact was there any testimony admitted against the objection of the defendant. As the case went to the jury then its shape was all the defendant asked, so far as the evidence was concerned.

As to the law of the case. It stood before the jury in the very language of the defendant, and the request of the defendant to the court was granted, except in a point so patently erroneous, in

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Brief of counsel for the plaintiff.

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the shape the defendant had by consent given the evidence of plaintiff's rights as a participant, that we do not propose to support the action of the court by any remarks.

It is this verdict the defendant asks to have set aside, the result of its own deliberate choice of position as to both the law and the testimony.

The spectacle of such a motion is, to say the least, rare in any court.

And the grounds on which the brief supports the motion are hardly less remarkable.

1st. That the basis of ascertaining the equitable value was not the correct one. Why? Because we tried to reach it without introducing the defendant through its officers personally as a witness; by substituting, as the record shows, without objection by defendant, the rates of insurance used by defendant now all over the land, and the defendant responded, by examination of an actuary who had been introduced by us for a wholly different purpose, the relative deduction from those tables at age sixty-one, shown by the price at age fifty-seven in the policy with age fifty-seven in those tables, which, by the very argument of the defendant's brief, was what the jury adopted as the basis of their judgment.

The court will recall without difficulty that we tried to show an annuity of \$192, by deducting the premium of the policy from the premium of the defendant's publication, but that \$156.70 was fixed for the defence on the basis above referred to.

The objection then is either that we did not manage our case, as now, after sleeping on it, they think they might have made us manage it; or 2d, that they made a mistake in their own management, which they wish the court to give them opportunity to correct. Litigation would have no end if such views could influence motions for new trials.

The second ground is: That the jury failed to deduct the notes after finding the equitable balance; and that there was no proof, nor anything tending to prove, that the interest of plaintiff in the surplus of the company should have absorbed them. We submit that there was evidence, and much of it; that it was admitted without question by the defendant; that its weight and effect

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Opinion of the court.

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were argued fully ; that it was a question eminently such as a jury should decide ; and that it cannot possibly affect defendant's right to a new trial to suggest that a different judgment on the point might have been reached had the defence been differently conducted.

The suggestion in the commencement of the brief of defendant that the finding of the equitable value was slightly in excess of the apparent cash payment, was fully argued and fully explained in argument.

The opening for defendant almost wholly confined itself to the claim stated in plaintiff's opening ; and the evidence commented on was that the rights of plaintiff were to share equally in the *surplus* of the company, not simply to take the part of surplus declared in dividends ; that all assets were compounded ; that losses, forfeitures, short mortalities, and numerous matters enhanced this surplus ; and that by their own showing *the interest* receipts exceed the mortalities paid for. The jury had reasonable ground for their finding. We showed that the company thought and so said at the time the insurance was effected, doubtless based on its experience, that the dividends would absorb the notes.\* And proof, not objected to by the defendant, was admitted to show that the surplus, which the company's book, introduced without objection, showed to be the property in due proportion of the assured, exceeded forty per cent.

Respectfully submitted,

SAML. B. PAUL,

SAML. D. DAVIES,

Of counsel for plaintiff.

The following was the decision of the court, rendered by

HUGHES, J.—The defendant objects to the verdict in this case on the ground that the jury got at the amount of the equitable value of the policy by a wrong process and upon incorrect data, and that they erred in not deducting from the equitable value as found, the amount of the premium notes given by the plaintiff to the company.

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\* This was taken from the record in the former trial, which demonstrates that defendant was not surprised.

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Opinion of the court.

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The Supreme Court of the United States have decided in *New York Life Insurance Company v. Statham et al.*, 3 Otto, 24, that in cases in which, during the late civil war, Southern holders of Northern policies of life insurance were prevented by the war from paying their annual premiums, those policies lapsed ; but that the holders could claim, after the war and the death of the persons named in the policies, the *equitable value* of the policies at the time of first default in the payment of premiums.

In doing so the Supreme Court meant no more, I think, than to establish a principle of law. Nothing in their decision warrants the conclusion that they undertook more than to settle the legal question. I do not think that it was in the mind of the court, in thus declaring the law, to set out also the data upon which to determine, in every case, what the *equitable value* which they contemplated really was. The court uses many expressions, apparently designed to illustrate and explain what they mean by "equitable value," but they nowhere detail, with any attempt at completeness, either the data from which or the process by which this value is to be ascertained. They seem to refer these latter subjects to the actuary and the mathematician, and to leave the jury or the chancellor in each particular case to find as a fact what the equitable value of a policy is, from the best testimony at command.

I have no doubt the court used the phrase in its actuarial sense, but I do not see that they said anything intended to deprive the jury or the chancellor of the prerogative of estimating the amount of the equitable value of a policy, upon the strength of such evidence, as in each case might be adduced before them.

We had a very intelligent investigation of this subject at the trial in this case. The jury was an unusually good one, the trial fair and full, and the argument on either side able and exhaustive. The jury had the advantage of the testimony of very well-informed and competent witnesses, one or two of them learned experts. The question, what was the equitable value of this policy, in December, 1861, when default occurred in the payment of the premium ; and the further question, whether the amount of the premium notes which were given by the plaintiff in part payment of four annual premiums ought to be set off

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Opinion of the court.

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against such equitable value, were elaborately considered, and were both deliberately dealt with by the jury, on full proofs, after full argument.

Now, if I thought that the Supreme Court intended in its leading decision on this question to do more than declare that the plaintiff in such a case as this was entitled to the equitable value of his policy, and went on besides to define accurately the data and process for ascertaining its amount, I would feel authorized to examine critically the verdict rendered by the jury, and the data and process which they employed. But I consider that the Supreme Court intended only to declare the law, and left the jury to find the fact. The latter having been done in this case by the jury, I do not feel authorized to do more than consider whether or not the jury has so grossly erred as to the fact, and so clearly disregarded the law as to have presented a case for a new trial within the discretion of the court, as governed by the ordinary rules observed by courts in considering motions for new trial.

Counsel for defendant have exhibited correctly, no doubt, the process by which the jury got at the \$1615.47 which they found as their verdict. I have already said that I think it belonged to the jury to determine not only what amount they should find, but the process by which to ascertain the amount. I could not, therefore, interfere with the verdict unless it were grossly excessive. If this case had been before me as a chancellor, I am inclined to think I should have found a smaller amount; but the mere fact that a judge differs with a jury as to a fact does not make a case for a new trial.

Defendants complain that the verdict of the jury is for twenty dollars more than it would have been if they had adopted the empirical plan of adding together all the cash premiums which plaintiff had paid up to December, 1861, and given a verdict for the aggregate, with interest from the close of the war. They complain specially, of this result, that it imposes upon the insurance company the risk, without compensation, of the insurance which stood against them for four years. This is one view to take of the subject, though it must be remarked that as there was in fact no death during that period there was in reality no risk.

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Opinion of the court

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A compensating view of the matter is, that the plaintiff, at the date when his policy was terminated by law (December, 1861), had the right of insuring until the death should occur, at a very reduced premium, and also at the death (which did occur in a very few years) to the amount insured for, of \$10,000. This right he lost by operation of law, and the value which he so lost the company gained by the lapse of the policy; and therefore, in the light of actual events now known, the verdict of the jury cannot be regarded as practically injurious to the company. To the mind unskilled in the learning of the actuary and the mathematician, the verdict is apt to appear more liberal to the company than to the plaintiff; and inasmuch as it so nearly corresponds with the result of the science of so learned and expert an actuary as Professor Smith, who testified as a witness at the trial, I think the verdict commends itself as reasonably correct to practical minds. I see, therefore, no material objection to the verdict on the score of excessiveness.

The other objection of the defendants is, that the amount of the notes given for forty per cent. of the annual premiums (four in all) was not treated by the jury as a valid offset against the equitable value found as already shown. These notes were given by the plaintiff at the solicitation of the company's local agent, and on the assurance that the scrip dividends, which it was a part of the scheme of this company to declare and pay to its insurers, would be equal to and would pay off and extinguish these forty per cent. premium notes. The jury considered that these confident representations of the company's agent were sufficient to raise the presumption that the scrip dividends did in fact equal the amount of the notes, and to throw the burden of proving to the contrary upon the company. The whole matter was very fully gone into by counsel in their argument at the trial; the jury dealt with the case on this basis after full argument as judges of the fact; and, having virtually found as a fact that the scrip dividends did offset the notes, I am indisposed to nullify their verdict on that account.

The motion for a new trial is for these reasons denied.

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Statement of the case.

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*United States Circuit Court, Eastern District of Virginia, at Norfolk, November Term, 1878.*

**KELLY v. VIRGINIA PROTECTION INSURANCE COMPANY.**

A plea to the jurisdiction and demurrer thereto having been filed in the State court, and the cause thereupon removed under the act of 1875, before the State court had passed upon the plea :

*Held*, that though the plea was sufficient to have defeated the action in the State court, yet, inasmuch as it set out the facts requisite to give jurisdiction to the Federal court, the latter acquired jurisdiction by removal, and was bound to treat the plea as if the suit had been originally commenced in the Federal court.

ACTION on a policy of life insurance issued by the defendant company, a corporation chartered by the State of Virginia, to one Hathaway, a resident of North Carolina. The plaintiff is a resident of North Carolina. The action was brought in the Corporation Court of Norfolk, and the original process was served in that city, on one Childrey, agent of the company, who resided there, and through whose agency the policy was issued. The principal place of business of the company was at Richmond, Va. The defendant pleaded to the jurisdiction, averring its principal office and the residence of its president to be at Richmond, where, it is averred, the alleged cause of action arose. Demurrer to plea. The cause was removed to this court by the plaintiff, at the first term at which the cause could be tried, the court below not passing on the plea. The defendant moved to dismiss the cause as improperly brought.

**BRIEF OF SHARP AND HUGHES FOR THE MOTION.**

The cause in its inception was a nullity for want of jurisdiction. The State court could not pass on the plea, for after the petition was filed for removal, its powers *eo instanti* ceased. Dillon on Removals, 67. Either the Federal court must do so, or the advantage of the plea will be lost. As to removals: 2 Otto, 19; 4 McLean, 282; Dillon on Removals, 67, note 107; Ib. 71;

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Ib. 42, note 53; 15 Wallace, 580; 19 Ib. 222, 223; 1 Biss. 82; 2 Blatchf. 359, 362; Ib. 340; Ib. 107; 3 Ib. 112; Ib. 86; 6 Ib. 719.

*Garnett and White, contra.*

HUGHES, J.—In *United States v. Ottman*, 1 Hughes, 313, which could not have been brought in the United States court by original process, but could be and was brought originally in the State court, and was then removed into the United States Circuit Court, this court, following the decisions in *Sayles v. Insurance Company*, 2 Curtis, 212; *Barnes v. Bank*, 5 Blatchf. 107; *Pollard v. Dwight*, 4 Cranch; and *Tollans v. Sprague*, 12 Pet. 339, held, that, after the appearance of the defendant in the State court, the United States Circuit Court may acquire and in that case did acquire jurisdiction by the mere fact of removal in accordance with the terms of the act of Congress of March 3d, 1875. The case of Ottman differed from the other cases just named, in the fact that in those cases it was the defendant who had moved for removal, whereas in the Ottman case it was the plaintiff who so moved. This fact was thought to constitute a principle, especially as the act of Congress giving a plaintiff (who had elected originally to sue in the State court) the right to change the forum by removal was not passed until March 2d, 1867. 14 Stat. at Large, 558. The principle decided was, that where both parties were before the State court, and the case was one which could, under the act of March 3d, 1875, be removed at the motion of either party, then the act of removal, in pursuance of the statute, of itself gave jurisdiction to this court.

The case at bar is undoubtedly one of first impression. The question it presents, I think, falls within the ruling of this court in the Ottman case and the authorities there cited. The defendant had appeared and pleaded; the court had not passed upon any question in the case, whether of jurisdiction or other. Before it had done so the cause was removed into this court. And the point presented by the plea to the jurisdiction, and by the demurrer thereto, which were both filed in the State court, is, whether the question of jurisdiction, now to be determined by this court, is to

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be so determined with reference to the jurisdictional powers of the State court, or to the jurisdictional powers of this court. The only lamp I have to guide my feet in the decision of this new question is the act of 1875, whose language is (section 3) that after removal "the cause shall then proceed as if it had been originally commenced in the said Circuit Court." This language is repeated in section 6 of the same act, with some amplification. That section is in these words:

SECTION 6. The Circuit Court of the United States shall, in all suits removed under the provisions of this act, proceed therein as if the suit had been originally commenced in said Circuit Court, and the same proceedings had been taken in such suit in said Circuit Court as shall have been had therein in said State court prior to its removal.

This language is too explicit to admit of doubt. I am required by it to treat the original process by which the suit was commenced in the State court, and all the other proceedings and pleadings there, not with reference to their value in the State court, but as if they had been proceedings in this court, and with reference to their value as such. Now, the plea to the jurisdiction of the State court is based upon the allegation that the cause of action did not arise, and that neither plaintiff nor defendant resided, in the city of Norfolk, in whose Corporation Court the action was brought. But the plea itself sets out that the cause of action arose in Richmond, a city of the Eastern Judicial District of Virginia; that the defendant is a citizen of Virginia, and of Richmond; and that the plaintiff is a citizen of North Carolina. In very words, this plea to the jurisdiction sets out matter to show conclusively that, tried as if the suit and its pleadings had been commenced originally in this court, this court has undoubted jurisdiction. Under the language, therefore, of section 6 of the statute of March 3d, 1875, I am bound to sustain the demurrer and overrule the plea. Ordered accordingly.

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Statement of the case.

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*United States Circuit Court, Eastern District of Virginia, at  
Richmond, December 3d, 1877.*

CORA A. COBB, R. H. COBB, A. L. COBB AND C. F. COBB,  
INFANTS, SUING BY THEIR NEXT FRIEND, L. R. EDWARDS,  
v. THE GLOBE MUTUAL LIFE INSURANCE COMPANY.

In order to remove a suit from a State court to a United States court, under the Judiciary Act of March 3d, 1875, the mere filing of the petition and bond in the State court by the party entitled to remove the suit is sufficient; and the jurisdiction to determine whether or not the case was removable and was properly removed, and a sufficient bond given, is in the United States Circuit Court, and not in the State court.

The United States Circuit Court in which the copy of the record of the State court in a removed suit must be filed, and in which the party making the removal must enter his appearance, is the court held at the place in which the suit in the State court was brought, or the place of holding the United States Court most convenient to that place.

ON the 12th November, 1877, the defendant company filed its petition in this court, of which the following is the material part:

Your petitioner, The Globe Mutual Life Insurance Company, a corporation duly incorporated by the laws of the State of New York, would respectfully represent to the court that, on the 3d of August, in the year 1877, Cora A. Cobb, Richard H. Cobb, Annie L. Cobb and Caroline F. Cobb, by L. R. Edwards, their next friend, sued out of the Corporation Court of the city of Norfolk, a summons against the petitioner, wherein it was required that the said company should answer a claim alleged to be due to the said plaintiffs upon a policy of insurance which the company had issued upon the life of one Henry V. Cobb, which said policy was for the sum of \$5000, alleging also in their declaration that the said H. V. Cobb had departed this life, and, therefore, the said policy is due and forfeited.

Your petitioner would further state to the court, that William C. Carrington was retained as counsel for the company to attend to its interests in this cause. That the case was duly proceeded with and matured in the said Corporation Court of the city of Norfolk.

That the counsel, William C. Carrington, was notified that the case was set for trial on a certain day, to wit, the 14th of September, 1877; that the said Carrington was at that time confined to his bed by sickness, and had been so for more than two months previous to that time.

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That it was wholly impossible for him to attend the trial of the cause on that day.

That in consequence thereof he requested a member of the Richmond bar to go to Norfolk and state the condition in which he was, and to ask the court for a continuance until the next term of said court.

That the attorney went to Norfolk and stated that he appeared not for the company, but for Mr. Carrington, who was unable to attend.

The court refused to continue until its next term, but set the cause for hearing on the 18th of said month. It is proper to state here that this last appointment was with the consent of Mr. Carrington's representative. That up to this time no plea of any kind had been put in by the company. When the 18th of September came, it was still impossible for Mr. Carrington to appear, he being still confined to his bed, and he sent instructions to Messrs. McIntosh & Brooke to appear for the company, and at the same time requested them to make a motion for the removal of the cause to the United States court, upon the ground that the said company was a foreign corporation, and, therefore, entitled to said removal. This motion the court overruled, upon the ground that the company having once appeared and agreed that the cause should be tried on a certain day, thereby submitted to the jurisdiction, and consequently lost its right to a removal.

The following is the clerk's *memorandum of proceedings* in the cause in the State court :

1877.—August Rules—Declaration and policy filed and common order.

September Rules.—Common order confirmed and writ of inquiry.

September 14.—Defendant appeared by attorney, and motion for continuance overruled. Motion to file two special pleas. Motion of plaintiff to reject special pleas sustained, and cause adjourned.

September 19.—Verdict, judgment, and four bills of exceptions.

September 22.—Fifth bill of exceptions filed.

September Term, 1877, of the Corporation Court adjourned September 25th, 1877.

October 9.—Order of judge in vacation, suspending execution for sixty days upon notice given and statement by defendant of intention to apply to Court of Appeals for writ of error.

October 17, 1877.—Bond under above order of 9th October given by defendant. Date of delivery of record to defendant's counsel, D. T. Brooke, a few days before the 7th of November, 1877, when the same was paid for.

Teste :

W. H. HUNTER, C. C.

*Memorandum of Defendant's Counsel.*

Our recollection is, that the copy of the record was delivered to us on Saturday, 3d of November, and one of the pleas being omitted, we returned the record for correction Monday, November 5th, which was done at once, we think, the same day.

McINTOSH & BROOKE.

On 12th of November, 1877, a writ of certiorari was issued by the clerk of the United States Circuit Court, on application of the defendant, to the clerk of the Corporation Court of Norfolk, returnable at Richmond forthwith. The plaintiff now (December 3d, 1877) moves to quash the writ of certiorari and dismiss the defendant's petition.

HUGHES, J.—The Constitution of the United States extends the judicial power of the United States to “all controversies between citizens of different States,” so far as it shall be vested by act of Congress in the United States courts. Section *three* of the Judiciary Act of Congress, of March 3d, 1875, provides that any suit in a State court in which there shall be a controversy between citizens of different States, and in which the value in controversy exceeds \$500, may be removed into the Circuit Court of the United States for the district where the suit is pending, on the petition of any party to such suit. The act directs, that if such party *files his petition* for removal in the State court *at the term at which the suit could be first tried and before the trial*, and also *files therewith a bond*, with sufficient security, for his entering in said United States Circuit Court, on the first day of its then next session, a copy of the record in such suit, and for paying all costs that may be awarded by the said United States Circuit Court if its decision should be against him—it shall *then be the duty of the State court* to accept said petition and bond, and proceed no further in such suit. It further directs that, on the said copy being entered as aforesaid in said United States Circuit Court, the cause shall then proceed in the same manner as if it had been originally commenced in the said United States Circuit Court.

Section *five* provides, that if it shall at any time appear to the

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satisfaction of said United States Circuit Court, etc., that such suit does not really and substantially involve a controversy properly within its jurisdiction, or that the parties to said suit have been improperly or collusively made or joined for the purpose of creating a case cognizable or removable under this act, the United States Circuit Court shall proceed no further therein, but shall dismiss the suit, or remand it to the court from which it was removed.

Section *seven* provides that in the event that the session of the United States Circuit Court held next after the filing, in the State court, of the petition and bond for removal, should commence earlier than twenty days thereafter, then the party obtaining the removal may have twenty days within which to present the copy of the record to the said United States Circuit Court.

This is the latest enactment of Congress on the subject and revises all previous acts, and repeals them so far as they are inconsistent with its provisions.

It will be seen that the Constitution of the United States gives either party to a controversy, in which the parties are residents of different States, the privilege of having his rights determined by a court of the United States; and gives Congress the authority to prescribe, by law, how and under what conditions that right may be exercised, in those cases where the suit has been brought in a State court.

Section *three* of the Judiciary Act of 1875 makes the mere filing in the State court, of the petition and the bond, all that is necessary to stay the proceedings of the State court, and makes it "the duty of the State court," on this filing, to suspend its proceedings.

Section *five*, in as plain terms as the English language affords, gives to the United States Circuit Court complete jurisdiction to determine whether the suit was one that could be properly removed; and to decide, after making such determination, what to do with the suit; whether to proceed in it, or to remand it to the State court, or to dismiss it outright.

Such is the spirit, such the language, such the intention, and such the force and effect of the act of Congress of March 3d, 1875 (p. 470-3, vol. 18, United States Statutes at Large), which

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being passed in pursuance of the paramount organic law, is thereby, as to this particular subject, paramount to any law of State enactment or adoption, relating to the jurisdiction of the State court.

By the filing of the petition and bond in the State court, showing that the controversy is one "between citizens of different States," the jurisdiction of the State court from that moment ceases, and all that that court may do in the matter afterwards is *coram non judice*, null and void. The question of the sufficiency of the bond itself, the competency of the petition, the validity of the removal, and each and all questions arising upon the petition, are taken away by this law from the State court, and reserved by section *five* for the United States Circuit Court, to be passed upon in the exercise of the unembarrassed and undivided jurisdiction which this act gives it, under the authority of the Constitution, over all "controversies between citizens of different States."

Practically, the action of the Corporation Court of Norfolk defeated the constitutional right to which the defendant company in this suit was entitled,—to have its controversy tried and determined in a Federal court.

The motion for removal on the 18th of September, accompanied by petition and bond, was overruled by that court, although it was in time, being made at the term of the State court "at which it would be first tried, and before the trial." I suppose that court acted on some law of Congress relating to removals of suits, of prior date to the act of 1875 now in force.

The mere fact that counsel not regularly employed, and acting for the regular counsel, who was sick in another city, had moved for a continuance on or about the first day of the term, had no effect in law on a question of constitutional right, and could not deprive the client of the moving counsel of his right to avail himself of the privilege of removal which he still had upon filing petition and bond *at that term and before a trial*.

The effect of the refusal of the State court to allow the removal though *nil* in law, yet practically resulted in putting the defendant to the care and labor and expense of preparing for and going through a trial, and afterwards of securing an appeal to

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the appellate State court, from the decision against him of the Corporation Court of Norfolk.

The defendant by counsel, in argument, avers that in consequence of being thus preoccupied and engaged with the defence and appeal, it neglected to file a copy of the record of the State court in this court within the twenty days prescribed by the Judiciary Act of 1875, section *five*.

The record of the State court was not filed, either on the 1st of October, which was the commencement of the term of this court at Richmond, or within twenty days from the 18th of September in the court at Richmond, or in this court on the first day of its Fall Term at Norfolk, which was the 5th of November. Not having been filed within the time allowed by law, the suit has not been removed to this court.

I will say a word *passim* as to the place to which the suit should have been removed. The suit having been brought in the State court at Norfolk, the proper place to which it should have been removed was to the United States Circuit Court at Norfolk; and the proper time at which to file the record there was at the November Term, which commenced on the 5th day of that month. The case was not properly removable to the United States Circuit Court at Richmond, the Fall Term of which began on the 1st of October. The plaintiff in the suit had a right to have the suit heard in the United States Circuit Court at the place at which it was brought, if a United States Circuit Court was held there; and it would have been erroneous for the defendant to have removed it to the United States Circuit Court at Richmond.

The copy of the record of the State court not having been filed in the United States Circuit Court at Norfolk before the first day of its November Term, nor the defendant's appearance entered there on that day, it follows that the suit has not been removed in the manner prescribed by the Judiciary Act of 1875, and this court is, therefore, without jurisdiction to entertain or proceed in it.

The fact that the defendant lost his right of removal in consequence of the action of the State court, cannot operate in any way to confer upon this court a jurisdiction which was not se-

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cured to it by a compliance, on defendant's part, with the requirements of the act of 1875. He should have filed his record and entered his appearance on the first day of the November Term of this court at Norfolk, independently of and notwithstanding the action of the State court. It is to be regretted that the defendant has lost a constitutional right; but there is no power of redress lodged in this court under the circumstances attending this case.

The right of choosing the forum is given by the Constitution and laws to either party to the controversy. It is the will of the party, expressed in the manner prescribed by law, which determines the forum; and his expression of that will ought not to be treated by the State court as an act invidious towards itself. Though in form the party chooses between courts, his choice is really a preference between a jury selected, as in the United States court, from a large district of country, and a jury selected, as in the State court, from a single county or town.

It is the will of the party to the suit, I repeat, which determines the forum which shall try and decide the controversy. Unless that will is expressed to the contrary, the State court has full jurisdiction of the suit and of all questions incidental to it. After its expression, this full jurisdiction passes by the will of the petitioner, and not by any seeking of the Federal court, to the Federal forum. The Federal court has then no more power to decline the jurisdiction than the State court to retain it. Nothing could be more unseemly than a struggle between the two courts for a jurisdiction which the law and Constitution of the land makes subject alone to the *bona fide* volition of either party to the controversy.

For a long time Congress gave this right to the non-resident defendant alone—not exhausting the power and discretion intrusted to it by the National Constitution. Now, however, that right is given to “either party” (section 2, vol. 18, Statutes at Large, p. 471) to a controversy between citizens of different States, whether resident or non-resident, whether plaintiff or defendant. The enlargement thus of this right by Congress is in pursuance of an express provision of the National Constitution

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as it came from its illustrious framers in 1787, and is not a just ground of criticism or complaint by any State court.

The motion to quash the writ of *certiorari* and to dismiss defendant's petition is, therefore, granted.

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*United States Circuit Court, Eastern District of Virginia, at Norfolk, 8th January, 1879.*

## STEWART &amp; TUCKER v. GOGORZA'S SONS.

The mechanics' lien law of Virginia does not apply to ships while in the process of being built in a public shipbuilder's yard, under a contract by which the ships were the property of the owners and not of the builder from the laying of the keels, in favor of materialmen who gave credit to the builder and not to the ships.

IN chancery, on attachment process, under claim of lien by lumber dealers, and against non-resident defendants.

*Godwin & Crocker and Parker & Allen, counsel for plaintiffs.*

*Garnett & White and Charles Sharp, counsel for defendants.*

George W. Beach was, in 1877, a shipbuilder in Norfolk, conducting a shipbuilder's yard and an iron-works adjacent. In the winter and spring of that year he was engaged in building two brigs for the defendants, Gogorza's Sons, and one or two or more other vessels for other persons. Under his contract with Gogorza's Sons they were to be owners of the two brigs from the commencement of work upon them, and were to make payments to him for the value of the work and material as it progressed. These payments were punctually made as agreed. The defendants were then, as they are now, residents of New York city.

Beach ordered a bill of lumber and timber from the plaintiffs,

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Stewart & Tucker, which was delivered in April, 1877. Another bill was ordered, which was delivered on the 19th May following. Beach made some mention, at the time of ordering one or the other lots of this lumber, of his desire or intention to use it in one or the other of the defendants' brigs. All transactions of the sort between Beach and the plaintiffs ceased with the delivery of May 19th. Beach was to have paid for the lumber in cash, but in fact he paid only about a fourth or less of the amount in money. He gave negotiable notes for the rest of the money due, namely, two notes for \$500 each, and one for \$343.18, dated respectively on the 18th and 25th of April, and on the 18th June, 1877, payable respectively forty, sixty, and thirty days after their dates. One of the notes for \$500 was passed off by Stewart & Tucker by discount to a third person, and was not their property at the time of the commencement of this suit. On one of the other notes a payment of \$100 was made. Except as to this latter credit, the notes are all due, and this suit is brought to recover the amount of them, not from Beach, but from the defendants, Gogorza's Sons.

It is not pretended that the plaintiffs furnished this material on the credit of the vessel, which they have attached, or of the defendants. On the 24th of November, 1877, Stewart & Tucker drew off an account of their claim against Beach, made affidavit to it, and filed it as a claim of lien upon the Harriet G. (one of the brigs named), in the clerk's office of the County Court of Norfolk County, conforming thereby to the provisions of the 4th section of chapter 115 of the Code of Virginia, amended by chapter 357, p. 437, of the Acts of Assembly for 1874-5. It is in proof that a considerable part of the lumber and timber furnished by Stewart & Tucker went into other vessels than the Harriet G.; that a portion of it was unfit for use and was not used in building vessels; that some of it passed to Beach's assignee in bankruptcy after his adjudication as a bankrupt, in August, 1877, and was sold by the assignee; and that only the better portion of it, probably not the larger portion, went into the Harriet G.

The suit is a proceeding in chancery commenced by process of attachment *in rem*, issued against and served on the brig Har-

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riet G., which was replevied by the defendants on bond. The bill makes Gogorza's Sons defendants, and proceeds against them as non-residents. It does not make Beach a defendant.

The object of the suit is to recover from the defendants a debt due by Beach, by subjecting the defendants' property to an alleged lien for the amount now represented by the negotiable notes that have been described. No judgment has ever been obtained by the plaintiffs against Beach for the amount of the notes. The plaintiffs did not prove the claim in Beach's bankruptcy. That the amount of the notes is due from Beach to the plaintiffs has never been determined judicially, or reduced in any manner, form, or proceeding, to judicial certainty. The notes of Beach to the plaintiffs are a mere matter *in pais*, in which the defendants have no privity, and for which they are under no sort of personal responsibility, legal, equitable, or moral.

HUGHES, J.—The object of this proceeding is to subject Gogorza's Sons to this debt, through a claim of lien upon a vessel of theirs, into which some of the timber which was the subject of the debt of Beach was put by Beach as a shipbuilder conducting a public shipbuilder's yard, to whom the lumber was delivered on contract to pay cash for it, and not on the credit of the vessel or of the defendants.

The proceeding is founded on the *third* and *fourth* sections of chapter 115 of the Code as amended; which chapter treats "of the lien on land for purchase-money, or of mechanics and others for buildings erected or repaired, and of liens on crops for advances." The plaintiffs rely solely upon the provisions of that chapter.

It need not be stated that a statute treating of the lien on land or for buildings erected or repaired, vouched in support of a claim like the present one, of a lien on a ship on the stocks, should in the interest of the freedom of contracts and of commerce be strictly construed.

It has been held on more than one occasion by this court, that the provisions of the chapter of the Code of Virginia just mentioned apply only to buildings, improvements, and property connected with and appurtenant to real estate, savoring of the realty,

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and that they do not apply to mere personalty, mere chattels. If it were otherwise the greatest injury would be inflicted on the innocent purchaser of personal property; and the most serious embarrassment and obstruction would be introduced into all the ordinary transactions between citizen and citizen. A farmer could not purchase safely a wagon, or a plough, or a wheelbarrow from a wheelwright, without first going to the clerk's office of his county and ascertaining whether a claim of lien had been filed there by the mechanic who might have worked on the article, or the materialman who might have furnished the wood or iron used in its construction. I do not think that any other construction of the provisions of chapter 115 than that just indicated, which is, indeed, implied in the title of the chapter itself, is admissible logically, or could be enforced in practice. And therefore it is hardly necessary for me to do more than hold that the claim of lien filed against this brig by the plaintiffs, on the 24th of November, 1877, under section *four* of the chapter of the Code under review, does not establish a lien upon a ship on the stocks, such a structure not being a "building" erected on land, or an "improvement," or "property," connected permanently with land according to what seems to me to be the necessary intendment of that chapter of the Code.

But this claim of lien could not be allowed, even if we could treat the chapter as covering personal property not connected with or savoring of the realty.

Section *fourth* requires any person furnishing material about a *building* for a general contractor, in order to make good his lien, to file within thirty days after the completion of the *work*, on affidavit, a true account of the materials furnished, in the clerk's office of the County Court of the county. The materials claimed in this suit were furnished and the "work" of delivering them completed on the 19th day of May, 1877, and the plaintiffs' account and claim of lien were not filed until the 24th of November, 1877, which was too late, not being within thirty days.

This omission is not cured by section 7th of chapter 115 of the Code, giving a longer time for filing the claim of lien in cases where the "contractor" gives credit on payments for a "building." The contractor there meant can be only the contractor for

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the building, and the credits contemplated are credits given to the owner or person for whom the building is constructed. Here the contractor, Beach, *received* credit from Stewart & Tucker, and did not *give* it to Gogorza's Sons. Here the owner of the "building," Gogorza's Sons, were all the while in advance in their payments, and not receiving credits on any of them.

Nor have the plaintiffs brought their case within the terms of the *fifth* section of this chapter of the Code, which requires of subcontractors and materialmen, *in addition* to the requirements of section *fourth*, that they shall, besides filing their claim of lien within thirty days after the completion of their "work," notify the owner of the "*building*" of the amount of their claim for materials within twenty days after the "building" is completed. It is not pretended that this provision of law has been complied with. The claim of the plaintiffs, therefore, is not good, even in view of the requirements of chapter 115.

On the merits also the case is against them. The Code requires by necessary implication that the materials furnished by a lumberman shall be furnished specifically for a building, and must be used in its construction. This lumber and timber was furnished to a shipbuilder engaged in building several vessels, and the shipbuilder was at liberty, under his engagement with the plaintiffs, to put their stuff into any of the vessels he was constructing, or to sell it, or to ship it off without using it. Surely the mere casual mention of his desire or intention to use the lumber in two brigs, at the time of ordering it, without any stipulation direct or indirect that he should use it only in those brigs, cannot bind an owner hundreds of miles distant to pay to the lumber dealer the price of timber bought for use and used indiscriminately in that and other vessels.

On the law and the merits the bill must be dismissed, and I will sign a decree to that effect.

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*In the Circuit Court of the United States, for the District of Maryland, at Baltimore.*

CHARLES D. MILBOURNE AND WILLIAM MCGEE v. SCHOONER DANIEL AUGUSTA, AND WILLIAM H. VICKERS AND WILLIAM J. CARROLL v. SCHOONER DANIEL AUGUSTA.

What work, material, and supplies are, and what are not liens upon a domestic vessel under the law of Maryland and the decision of the United States Supreme Court in the Lottawana case.

IN admiralty. Appeals from the District Court.

BOND, J.—These are two libels, filed by citizens of Maryland, to enforce a statutory lien, given by section 44 of article 61 of the Maryland Code of Public Laws, against a domestic vessel in a home port.

The section is as follows :

All boats or vessels, of any kind whatsoever used or intended to be used on the waters of the Chesapeake Bay and its tributaries, the Chesapeake and Ohio Canal, and other waters of this State, as carriers of freight or passengers, and all other boats or vessels belonging in this State, shall be subject to a lien and bound for the payment thereof as preferred debt for all debts due to *boatbuilders, mechanics, merchants, farmers, or other persons*, from the owners, masters, or captains, or other agents of such boats or vessels *for materials furnished or work done in the building, repairing, or equipping the same.*

The first libel claims to have a lien under this section of the Code for repairing and furnishing the materials to repair a new topsail, mainsail, foresail, and jib, and for a large amount of rope and tackle furnished for the schooner's repair and use. The requirements of the Code of Maryland relating to the manner of acquiring a lien of this kind have all been complied with. There was a mortgage on the schooner properly recorded, amounting to one thousand dollars without interest.

We can see no reason why the decree of the District Court, which held the schooner responsible for the repairs and materials

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furnished by the libellants, should not be affirmed. The materials furnished went into and became a part of the schooner. The work and labor charged for were done in working the new material into the schooner. Since the case of the *Lottawana*, 21 Wallace, there can be no doubt of the power of a court of admiralty to enforce a lien given by a State statute upon a domestic vessel in a home port. The debt set out in the libel is within the words of the Maryland statute. It is due to a "mechanic" and "merchant," and is for "materials furnished" and "work done," in "repairing" and "equipping" the schooner.

The second libel is for groceries furnished to the schooner. There is no dispute about the account. The only question is whether or not there can be a lien under the Maryland statute for supplies furnished to a domestic ship in her home port. In the Code of Maryland this lien is found under the title mechanics' lien. Originally mechanics alone were protected under it, but from time to time its scope has been widened until now its terms, as we see from its recital above, embrace boatbuilders, mechanics, merchants, farmers, or other persons. Still the idea of the law that the lien should be for something which tended to increase or create the *res* upon which the lien attached has been preserved. For though the lien is given not only to mechanics and materialmen, but to other persons, it is only so given for materials furnished or work done in building, repairing, or equipping the vessel. The lien will cut out a mortgage, though prior in date, if unrecorded, and justly, for the theory of the law is that the mechanic or materialman has added something, by goods furnished or work done on the vessel, which the mortgage did not embrace, for they were not there when it was executed. The articles mentioned in the libel in this case are not materials furnished in repairing or building the ship. They are supplies furnished her crew. They never became a part of the *res* upon which the libel is laid. They are no part of the equipments of the ship, for the word equipment refers only to something in her which goes to make her a complete ship *qua* ship, and not to that which is necessary to the comfort and support of the crew. A ship is fully equipped when she floats complete as a ship without a crew, to say nothing of what they are to eat. A soldier is fully equipped

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as a soldier when he has his clothing and arms. His haversack, which is part of his equipment, may have no rations in it. The water-cask of this schooner was a part of her equipment. It was part of her. The water in it was part of her supplies, not her equipment. For these reasons we think the decree of the District Court in this case should be reversed.

Decrees will be signed in accordance with this opinion.

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*In the District Court for Maryland, at Baltimore, 1877.*

THE UNITED STATES v. JOHN E. BENNETT.

The law of the United States (especially section 5347 of the United States Revised Statutes) follows an American vessel wherever she may be on navigable waters, so that an offence committed on board such vessel is an offence against the United States, though the vessel be in the harbor or river of a foreign country.

THE defendant was indicted for a violation of the 5347th section of the Revised Statutes, which punishes any officer of any American vessel on the high seas, or on any other waters within the admiralty and maritime jurisdiction of the United States, who, under the conditions as to malice expressed in the section, beats, or imprisons, or inflicts cruel punishment on any of the crew of such vessel.

The indictment alleged that the offence was committed on board of the American ship Macaulay on certain waters (other than the high seas) within the admiralty and maritime jurisdiction of the United States, to wit: those of the tidal river called the Garonne, near the city of Bordeaux, in the Republic of France.

To this indictment the defendant demurred. On the argument of the demurrer it was agreed that at the time of the offence charged the vessel was in the river Garonne, lying close and fastened to a wharf built along the bank of the river, which runs

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past the city, and the wharf in question, as well as all the wharves, being built along the river-bank.

It was contended by the defendant's counsel: "That the river being in a foreign country the vessel was not on waters within the admiralty and maritime jurisdiction of the United States. That the 5th section of the act of 1825, ch. 65, had been omitted from the Revised Statutes." This section of the act of 1825 provided: "That any offence committed on any American vessel while lying in a place within the jurisdiction of any foreign state by any person belonging to the ship's company or passengers should be cognizable by the proper Circuit Court of the United States, as if the offence had been committed on board the vessel on the high seas; *Provided*, That if by a proper court of the foreign state the offender had been acquitted or convicted, he should not be again tried by the United States." It was also contended for defendant, that this omission had repealed all law by which the United States could punish an offence committed upon an American vessel not on the high seas, or on an arm of the sea, or on waters within the territory of the United States, but on waters within the territory of a foreign state.

The omission of this section of the act of 1825 from the Revised Statutes was admitted.

It was contended for the United States: "That the law of the United States followed persons on board an American vessel wherever she might be on navigable waters, and that the offence in this case was committed on waters within the admiralty and maritime jurisdiction of the United States in this, 'That the waters floating the vessel became within such jurisdiction by virtue of the jurisdiction of the United States over the vessel and her company, and to that extent.'"

District Judge Giles delivered a short oral opinion in which he concurred with the views of the district attorney, and decided that the offence was within the 5347th section of the Revised Statutes, notwithstanding the omission from the Revised Statutes of the 5th section of the act of 1825, which section he held to be declarative and for greater certainty, and overruled the demurrer.

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*Archibald Stirling, Jr., United States Attorney, for the United States.*

*W. Fell Giles, Jr., for the defendant.*

NOTE.—In a similar case tried before me in Baltimore, in March, 1879, while holding court for Judge Giles, I expressed a doubt whether the decision in the foregoing case had not gone too far, but, inasmuch as I was holding the court for Judge Giles, I followed his ruling.

RO. W. HUGHES.

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*United States District Court, District of Maryland, March, 1879.*

NATHANIEL GUIBERT & SONS v. BRITISH SHIP GEORGE BELL.

The statutory rules of navigation, as to fog-bells and fog-horns, must not be construed to excuse the faults of bad seamanship.

A vessel must not sail in a fog with too much canvas to allow of prompt manœuvring to avoid collision with craft lying at anchor.

The presumption of fault is conclusive against vessels sailing with too much canvas in a fog in fishing waters, and colliding with vessels at anchor where there is no *vis major*.

IN admiralty. Libel for collision.

*Messrs. Brown and Brune, for the libellants.*

*Messrs. Brown and Smith, for the respondents.*

The facts of the case and the questions of law raised appear in the opinion of the court, which was as follows:

HUGHES, J.—This is a libel of a British ship by citizens of the French Republic, for damages sustained from a collision on the high seas. It is a case purely international, and is to be determined by the principles of general law applicable to torts in

admiralty. France and England, as well as the United States and all maritime states of any repute, have adopted, as a part of the general admiralty law, a well-known series of rules of navigation for the prevention of collisions at sea. The regulations thus generally adopted had been first promulgated by act of the British Parliament in 1862. Though statutory, they are an international code, obligatory upon all mariners, which the admiralty courts of the world are bound to enforce.

Before stating such of these rules as govern the present case, I will set out the leading facts of the collision which is the subject of this libel, as I have gathered them from the voluminous, and in many respects conflicting, testimony which has been read at bar from depositions taken on either side.

The French brig Briha, a fishing vessel of 130 tons, was anchored on the Grand Bank of Newfoundland, latitude  $45^{\circ} 54'$ , longitude  $52^{\circ} 43'$ , on the 9th of August last, with a crew of twenty-one men. At half-past five o'clock on that morning, one hour after sunrise, she was run into by the British ship George Bell of 1100 tons, and sunk with all the effects on board, and the loss of two of her crew.

At half after four she had sent out her two fishing boats, each with seven men, on their daily duty of examining the lines which were used in their business, and which were attached to buoys set at distances of half a mile to a mile or more on each side of the vessel. Seven men remained on the brig, among whom was the captain. These were all on deck after the departure of the boats. There was a breeze from the southwest, and the brig at anchor was heading to that point. There was a pretty heavy fog, but it was not so dense as to prevent an object as large as the brig from being seen at a distance of three hundred yards or more, an hour after sunrise. At a moment five to ten minutes before half-past five, the men on deck of the brig saw in the direction of the sun a ship, apparently under full sail, heading N. by W., making directly towards them. Under the master's direction, one of them rang the bell, and another began to blow the fog-horn, to give warning to the ship. She seemed to pay no attention to these signals, took down no sail, and made no manœuvre to change her course; but came on bearing right

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across the brig. She was on the port tack and close-hauled within six or seven points of the wind. The men on the brig became more and more alarmed, blew the horn, and rang the bell repeatedly, and in addition shouted and gesticulated with all their might. But the ship came steadily on without changing her course or slackening her speed until within a few yards of the brig, when she paid off to the starboard, thereby, instead of striking the brig amidships, striking her on her port-quarter at an angle of about forty-five degrees. The collision was at half-past five, an hour after sunrise.

The brig foundered and sank in the course of twenty or thirty minutes, carrying down all she had on board, including the men's clothing. The ship passed on for half a mile, or a mile or more, and then hove to. A raft was constructed by the men on board the brig, on which all saved themselves but two. These two were drowned and lost. The rest of the crew were taken up by the colliding vessel, which proved to be the British ship George Bell, and by another vessel which was passing near, and which proved to be the British ship St. George.

When the George Bell struck the brig, her master did not suppose any serious damage had been done; and his ship passed on for some distance until the brig was left out of sight. But just then there was a sudden lifting of the fog, when the master of the ship, discovering that the brig was in distress, hove his vessel to, and sent assistance.

Such are the leading facts of the case. It was a collision in the open sea, in daylight, by a ship under full sail, with a vessel at anchor. *Prima facie*, the ship is liable for the damages; but the defence set up by the respondent is,

1st. Fault on the part of the brig in not having rung her bell before the collision, as required by rule 10 of the British regulations (our American rule 15) of vessels at anchor in a fog; and,

2d. Inevitable accident; in that the ship had not timely warning from the brig's fog-bell of the brig's position.

I will first state the law applicable to such cases as this. It is well settled by the courts, that where a collision happens between a vessel under way and another at anchor, the presump-

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tion of fault is against the vessel in motion, and that the burden is upon her of proving fault in the other vessel. *Bill v. Smith*, 39 Connecticut, 206 ; Parsons's Maritime Law, 201 ; *The Lady Franklin*, Lowell, 220, and numerous cases, English and American, there cited. In the case of *The Granite State*, 3 Wallace, 310, the Supreme Court of the United States go as far as to say, *nem. con.*, that where there is no *vis major*, the fact of collision with a stationary vessel is *conclusive* evidence of fault on the part of the moving vessel, and this is undoubtedly the law whenever the stationary vessel is where she has a right to be.

It is true that rule 10 (our rule 15) requires vessels at anchor in a fog to ring their bells every five minutes ; but it is also true that if the failure to do so, in any particular case, is not proved by the moving vessel to have "contributed" to, that is, to have been the cause of the accident, then the moving vessel is liable, notwithstanding the failure. The rule of navigation in question is a general command to mariners emanating from the law-making power, and not a judicial determination in advance for every case of actual liability. Indeed, section 29 of the British Merchant Shipping Amendment Act of 1862, requires, by necessary implication, that in case of collision, it shall be proved that the accident was in fact occasioned by the non-observance of the appropriate regulations, in order to fix liability upon the vessel not observing the rule. Moreover rule 20 provides that the statutory regulations shall not be construed as exonerating any vessel from the consequences of any neglect of any precautions which may be required by the ordinary practice of seamen or by the special circumstances of each case. And the Supreme Court of the United States in the case of *The Grace Girdler*, 7 Wallace, 203, say, that the statutory rules of navigation shall not be construed to excuse the fault of bad seamanship, or warrant the neglect of any proper precautions by a vessel moving under circumstances requiring such precautions to be taken. Nay, more, rule 19 (our rule 24) authorizes the non-observance and violation of any particular rule where such departure is rendered necessary to avoid immediate danger.

In the light of the law thus explained, the case at bar depends upon two questions, viz. :

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1st. Did the brig neglect to ring her fog-bell as required by rule 10; and, if so, did that neglect in great or less degree cause the collision? and

2d. If not, did the collision occur in consequence of faulty management on the part of the ship, or by inevitable accident?

The weight of the evidence in this cause is to the effect that the night preceding the collision had been foggy and that the fog continued for more than an hour after sunrise. It was, therefore, the duty of the brig to ring her fog-bell every five minutes during the night and up to the time of the collision. I do not think she is proved to have done so during the night; but it is proved that she did so during the time the *George Bell* was within hearing of her bell. The ship was to windward of her, and it is proved that a bell in those waters does not sound as far to the windward as a horn. The brig's bell was sounded full five minutes before the collision; it was repeatedly sounded during the period of five minutes.

The weight of evidence is to the effect that the ship was moving at the rate of five knots an hour, which was a rate that would place the ship seven hundred and thirty-three yards from the brig at the time she was first seen and the fog-bell was first rung. The ship being to windward, the brig's bell could not, according to the evidence, have been heard before that moment from the ship; and, therefore, so far as the ship could be affected, the ringing of the bell from that moment was in time to place the brig in compliance with rule 10. The brig did more than thus comply with that rule. She used the horn vigorously. She also, by the shouts and gesticulations of all on board, did everything in her power to warn off the ship. I hold, therefore, that for all the purposes of this case, the brig, even though she might have been technically in fault as to the night ringing, was not actually in fault as to ringing the bell in connection with this collision. As to this she gave warning to the colliding ship, not only by compliance with rule 10, but also in the most effectual modes which were at her command.

We come therefore to the crucial question in this case, namely, whether the accident was inevitable, or due to fault on the part of the ship.

The accident occurred in the daytime. There was a pretty heavy fog. All the testimony of the brig's crew, and the testimony of some of the ship's crew, goes to prove that the two vessels were visible to each other for a period of five minutes before the collision. Captain Allen, of the ship, himself testifies that after passing by the brig, after the collision, he could see her through the fog for five or ten minutes before she became obscured from sight. He himself thereby confirms the brig's witnesses in their statement that the ship, before the collision, was seen for five minutes by the brig's crew. I know that he also says the brig was only a few ship's lengths off from him when he lost sight of her five to ten minutes after the collision, but I cannot believe she was that near, for his vessel continued in motion under considerable headway and canvas, and was but little less susceptible of being checked in her course just after the collision than she had been just before that event. He must have gone several hundred yards beyond the brig before she ceased to be visible in the fog, and before he hove to, "half a mile to a mile and a half" off.

The testimony of three of the men who were on the ship's deck, Jacobson, Jepson, and Gibbons, is virtually to the effect that there was as much as five minutes of time between the moment when the two vessels became visible to each other and the moment of collision. Jepson says expressly that he heard the brig's bell ringing three to five minutes before the collision. I need not collate the declarations of the several witnesses on this point. True, on the other hand, there is testimony of other witnesses, who gave it as their opinion that in that fog, on that morning, objects could be seen only at such and such distances, which were very short. But this conjectural testimony is worth nothing against that of witnesses who state as a fact that they actually saw these vessels five to ten minutes before and after the accident. We are bound to act upon evidence of facts, and cannot safely trust to conjectures or vague and varying surmises. I feel bound to conclude on the whole that the vessels were visible to each other a full period of five minutes before the collision.

I am warranted by the evidence in assuming, further, that the ship was running at the rate of five miles an hour, for that is the

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teaching of the evidence, carefully sifted and weighed. Even if she had been running at as low a rate of speed as three miles an hour, she would have been four hundred and sixty yards distant from the brig at a moment five minutes before the collision. The ship was sailing close to the wind on the port tack, with all sails set except the main-topsails and the royals. There was a good breeze. The ship was in ballast, and it is hardly probable that with as much canvas as she had spread, she was moving at a much slower rate than five miles per hour. The St. George was going at the rate of three to four miles near by, with much less sail, namely, her two jibs, her mainsail, her topsails, and topgallant-sails, only.

The case with the George Bell seems to me, therefore, to be this: The brig was lying broadside in her course, showing six feet above water, her sides painted black, with a white band four inches wide just under the rail, at a distance hardly less than three hundred yards, and probably as much as seven hundred yards from where the ship could have first seen her. This could have been five minutes before the moment at which the ship's speed would have brought her into collision, if her lookout had been in place. The ship was sailing at probably five miles an hour, with nearly all sails set. Such was the situation, and the question which presents itself is, whether the collision that occurred under such circumstances was the result of inevitable accident, or whether it was the result of faulty management or non-management on the part of the ship.

I cannot believe that the accident was inevitable. I am obliged to conclude from all the evidence that the ship could easily have avoided the brig but for inexcusable delay and negligence in taking the measures necessary in the emergency.

There has been much discussion by the courts as to the rate of speed at which vessels may move over grounds where others are likely to be at anchor, in the nighttime, or during a fog. I think the result of the decisions is, that it is incumbent upon navigators in such circumstances to move with caution and to keep their ships in trim and condition to be easily controlled and readily manœuvred to meet any emergency that may be probable or liable to arise. The speed at which they are moving is not

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more important than this tactical condition of the ship. Some of the decisions on this point are those of *The Frank*, 2 Quebec Law Reports, 301; *The Pepperell*, Swabey, 12; *The Juliet Erskine*, 6 Notes of Cases, 633; *The Europa*, 14 Jurist, 627; *The Virgil*, 2 W. Rob. 49; *The Thomas Martin*, 3 Blatch. 517; *Amoskeag Manufacturing Company v. Steam Ferry Company*, 1 Cliff. 404, and others.

Was the George Bell in the manageable condition which has been indicated, in sailing over the fishing-ground in which she ran down the Briha? I think not. The St. George was sailing in the same waters, in the same fog, at the same time. Her master said in his evidence:

I was moving between three and four knots an hour, and had been going so since 2 A.M. It is my custom not to spread canvas in a fog when I am not on deck. On this occasion it was on account of the fog that I did not care to have more sail on. I had on two jibs and a stay-sail, topsails, and topgallant-sails. I was on deck from 6 P.M. till 3 A.M.; then went below, but did not go to bed. At 4 A.M. I went up and had a look at the weather. I went on deck again at a quarter to 6 A.M.

It is from this evidence of an accomplished mariner and thorough seaman that we may learn what was prudent to be done by a ship moving in those waters, in that fog, on that night and morning; and it confirms me in the belief that the master of the other ship, the colliding ship George Bell was not justifiable in spreading so much canvas as he had out on that occasion. The fact that his main and mizzen sails were spread, rendered his ship less responsive to the helm than it should have been when the helm was finally put hard aport. I doubt if that was the proper thing to do with the helm on the occasion, and I believe that that manœuvre insured the collision, and justifies the principle of rule 19 (our rule 24), which authorizes a disobedience of express rules when "necessary to avoid immediate danger." I conclude that the ship was in fault in moving under too much canvas in the unmanageable condition in which she was at the time of the collision. I do not think that the rate of speed under which a vessel is moving under such circumstances is to be so much considered as whether she is so trimmed and conditioned

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as to be readily manageable in case of an emergency. Nor was the master of the colliding ship otherwise as cautious and careful as the occasion required. He had turned in at 11 P.M., and was not again on deck until just before the moment of the collision, when it was too late for him to control his vessel.

Yet, though the ship was at all the disadvantage which has been described, she could still have avoided the brig if proper measures had been taken to that end. If the lookout was at his post at the time the brig first became visible, he failed to do his duty. It seems from the second mate's testimony that five to eight minutes before the collision the lookout had gone below deck to get his coffee, and it is probable that when the men on the brig first saw the ship and rang their fog-bell, the ship's lookout was not at his post at all. And, if we are to believe Gibbons, whose testimony seems intelligent and consistent, the second mate, who was the officer of the watch on deck, was also at that time in the carpenter's shop at work at some job. These were the only witnesses that gave testimony who could have seen the brig from their positions on deck if they had been in place; for the helmsman was shut off from sight of the brig by the height of the unladen ship. These statements in the evidence establish the belief in my mind, that when the two vessels first became visible to each other there was no outlook in place on the ship's deck; and that after the lookout got to his place, and reported "a vessel under the lee bow," several minutes elapsed before the officer of the watch was in place to give the proper orders. The lookout's lusty blowing of his fog-horn "many times" during that important interval could accomplish no object but to summon the officer from the carpenter's shop, and seemed to be slow in effecting that; for no orders were given by this officer until just before the collision, when they were too late to be effectual for aught but causing the ship to strike the brig a glancing blow on the port-quarter instead of a direct blow amidships.

The collision ought not to have happened. I think the ship was in fault in no measures having been taken in time by those on her deck to avoid the accident. I think she was in fault in being under too much sail for those waters at that time, and in

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having her canvas spread in such a manner as to render her unmanageable in such a sudden emergency as was likely to arise at that time and place of the collision.

I will sign a decree for the libellants.

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*United States District Court, Eastern District of Virginia, at  
Norfolk, March 29th, 1879.*

E. O. MALTBY v. A STEAM DERRICK-BOAT.

A derrick-boat raised from the bottom of the channel of a public navigable river may be the subject of a libel for salvage in admiralty.

LIBEL for salvage in admiralty.

*R. M. Hughes, appeared as counsel for libellants.*

*W. B. Martin, for the Albemarle and Chesapeake Canal Company, intervenors and claimants.*

The facts and law of the case are set forth in full detail in the opinion of the court delivered by

HUGHES, J.—This is a libel *in rem* for salvage in raising a sunken steam derrick-boat from the channel of the Blackwater River, near Franklin, Virginia. The libellants sent around from Norfolk to the wreck for the purpose, by way of Currituck and Albemarle Sound, a wrecking schooner, furnished with chains, pumps, two divers, and a crew of two or three other men. The work of raising consumed about four days; but the schooner remained somewhat longer by the side of the derrick-boats until the hole in her bottom was made entirely safe and stanch. The schooner was gone from Norfolk in making the trip to and fro, and in executing the job, about fifteen days. The derrick-boat had been in the employment of the United States, on a hire of \$250 a month, in removing obstructions to navigation from the channel,

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when it sprung aleak and sunk in ten feet water. It was owned by the Albemarle and Chesapeake Canal Company, of which Marshall Parks is president. The salving was undertaken by the libellant at the request both of Mr. Parks and of the United States officer in charge of the derrick-boat. The boat had no machinery for propulsion, or sails. It was a boat of two decks, with a mast for hoisting purposes, and a steam-engine and machinery.

The United States continued to use the derrick-boat after it was raised from the channel by the libellants, and returned it in good condition to the Albemarle and Chesapeake Canal Company, after having had it in possession, in all, about four months. The vessel was libelled in this cause after its restoration to the possession of the company.

The company intervenes in this suit by answer, and objects to the amount of salvage claimed, and also to the jurisdiction of the admiralty court over the case, on the ground that the derrick-boat was not designed for navigation or commerce.

I shall consider in this opinion only the latter objection. It is contended in argument that a derrick-boat is not the subject of this jurisdiction, because it is not used in commerce and navigation. This might be a valid objection if the libel were for contract of affreightment, or for tort by collision, or such cause of action; but it is not a valid objection to a libel for salvage. It has long been held that *property*, whether it has been an actual instrument or subject of commerce or not, may be the subject of salvage.

In the case of *The Emulous*, 2 Sumner, 207, Judge Story held, in 1832, that salvage service extended to all *property* "saved on the sea or wrecked on the coast of the sea." In the case of *The Emblem*, Judge Ware, one of the most learned and soundest admiralty lawyers, awarded salvage from saving the trunks of a passenger containing silver coin. The coin was *property* forming no part of the cargo of the vessel. In the case of *Hennessey et al. v. Versailles and Cargo*, 1 Curtis, 355, Mr. Justice Curtis said: "The relief of *property* from an impending peril of the sea, by the voluntary exertions of those who are under no legal obligations, etc., constituted a technical case of salvage." In the two cases of *A Raft of Spars*, Abbott's Adm. 291, and 485,

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Judge Betts decided in the latter case that such *property* was a proper subject for a libel for salvage, and in the former case refused to order the salvage suit to be set aside or to be stayed because there was a replevin suit pending in a court of common law for the salvage property. In *Taber et al. v. Jenney et al.*, 1 Sprague, 323, a libel in admiralty was sustained by Judge Sprague to recover the value of the carcass of a whale which had been found floating in whaling waters by the defendants, and taken and converted to their own use. In the case of *The Union Express*, 1 Brown's Adm. 516, Judge Longyear held that a barge found adrift in Lake St. Clair was subject of salvage. In the case of *Fifty Thousand Feet of Timber*, 2 Lowell, 64, Judge Lowell held, notwithstanding two or three adverse decisions, hereafter mentioned, which he cited and reviewed, that a raft of timber was a proper subject of a libel for salvage, and defined the law to be that "a salvage service is performed when *goods* are saved from the peril of the sea, or on other navigable waters; or cast upon the shores thereof." The same judge held the same view in a valuable and learned judgment in the case of *The Louisa Jane*, 2 Lowell, 295, where he held that a specific "contract for saving *property* on the sea or in a harbor, did not oust the admiralty court's jurisdiction of a proceeding *in rem* or *in personam*, brought by the contractor himself." There is no judge whose decisions carry greater authority with the profession than those of Judge Lowell. In the case of *Cheesman et al. v. Two Ferry-boats*, 2 Bond, 363, Judge Leavitt held that two new and never-used ferry-boats, which had been brought down to Cincinnati for the purpose of being put upon one of the ferries there, and moored at high-water mark above the city, on the Ohio side, which had broken loose during a great flood and been saved, not by landsmen on shore, but by a steam-boat which encountered perils of the flood by doing so, many miles below on the Ohio River, were the proper subjects of a libel for salvage. There is also the case of *The Senator*, Brown's Adm. 372, which was that of a scow, loaded with lumber, water-logged and abandoned on Lake Erie, and saved, in which Judge Longyear held that a libel for salvage was proper.

I know of but two American admiralty cases which are decidedly adverse to the rulings which have been thus cited. One

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of them is the case of *The Hendrick Hudson* (an old steamboat fitted up as a floating hotel), 3 Benedict, 419, which is directly against them; and the other is the case of *Tome v. Cribs of Timber*, in Taney's Decisions, 533. This latter case, however, is not directly adverse. The rafts of lumber were saved on the shore of the Chesapeake Bay, below the mouth of the Susquehanna River, where they had been moored, and had broken loose in a high freshet. They were saved by farmers and landmen, who had incurred no risk and exercised no peculiar skill in saving them; but who had merely taken possession of them when they floated near the shore, and fastened them to trees on the shore. The service was wholly destitute of commercial or maritime attributes. These are the only American cases of which I know where the character of the property saved was made the objection to the admiralty jurisdiction in cases of salvage, and where the decision was adverse and based upon the non-commercial character of the property saved. The weight of the American authorities is, therefore, heavily against these two decisions, and I am constrained to disregard them, and to hold that any valuable property may be the subject of a libel for salvage in admiralty, provided that it shall have been saved under conditions which of themselves give the admiralty jurisdiction.

In the case at bar the saving was done by persons engaged in wrecking service, and furnished with and using a wrecking schooner and other wrecking appliances; and the principal and pivotal question is, was the saving done within the territorial theatre of the admiralty jurisdiction. The property saved was such as could be the subject of a libel for salvage; was the place where it was saved within that jurisdiction? The derrick-boat was sunk in the channel of a navigable river—navigable from the sea. The government of the United States was using the boat at the time in clearing away obstructions to the navigation.

It was formerly held that the admiralty jurisdiction of the courts of the United States, like that of the English courts, extended only to tide-waters. But, since the decision of the Supreme Court of the United States in *The Genesee Chief* (a decision which has been followed by a series of like decisions, more and more liberal on this point), the test of the admiralty jurisdiction,

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as to locality, has been the inquiry, was the water in question a public navigable water? And, therefore, the law of those cases which hold that property "saved on the sea or wrecked on the coast of the sea" must be read with the additional words, "or on the public navigable rivers and waters of the United States." The cases to which I have just referred are the following:

*The Genesee Chief*, 12 Howard, 449; *Fretz v. Bull et al.*, 12 Id. 446; *The Steamer Magnolia*, 20 Id. 296; *The Commerce*, 1 Black, 574; *The Steamboat Hine*, 4 Wallace, 555; *The Belfast*, 7 Wallace, 624, and other cases.

Before these cases arose there had been a period in the history of the American law in which our courts had made their rulings in accordance with the rulings of the English courts, which English decisions had been made during a period when, through the jealousy of the high common-law courts, the jurisdiction of the admiralty in England had been much trammelled. But our courts have felt, and acted upon, the necessity of emancipating themselves from these English influences for many years, so that early English precedents on the subject of the admiralty jurisdiction are not regarded in this country. Indeed, they have ceased to be law even in England, where in May, 1861, Parliament interfered, and, by special act in regard to the jurisdiction of the admiralty, struck off the shackles which had bound it for centuries, and gave to admiralty courts in England the broad and liberal jurisdiction which they possess in the world at large.

It was during the period of the original rulings of our American admiralty courts, and the subsequent transition period of opinion as to the character of the waters in which the jurisdiction of admiralty could be exercised, that some decisions were rendered by our courts tending to throw doubt on the question of the character of the property which was the subject of libel for salvage in admiralty. But I think the test as to what is the subject of salvage is no longer, whether it is a vessel engaged in commerce or its cargo or furniture, but whether the thing saved is a movable thing, possessing the attributes of property, susceptible of being lost and saved in places within the local jurisdiction of the admiralty. There are cases in the books in which the courts have denied salvage where property other than vessels of navigation or their furniture or cargoes has been saved; but these

will nearly all be found to have turned on questions of place, or questions not affecting the character of the thing saved. *The Ann Arbor*, 4 Blatchford, 205, decided in 1858, was that of a canal-boat libelled on a contract of affreightment made in Rochester at the west end of the Erie Canal, in which it was held that such a contract by a canal-boat made far inland was not within the admiralty jurisdiction, though process of arrest was executed on the Hudson River. But this was not a case of libel for salvage. In *Jones v. Coal Barges*, 3 Wallace, Jr. 53, decided in 1855, the libel was for a collision just below a lock in the Monongahela River in the mountains of Pennsylvania; and the court decided that the case depended upon the act of Congress of February, 1845, giving admiralty jurisdiction upon the Great Lakes "and the rivers and waters connecting" them. The Monongahela was not such a river, and the court on that ground denied the jurisdiction of the admiralty to entertain a libel for that collision in such a stream. It is plain that that case did not decide that coal-boats were not proper subjects of a libel for salvage. There are several cases in which libels have been filed for injuries to flat-boats and their cargoes, inflicted by steamboats on our Western rivers, which have gone up by appeals to the Supreme Court of the United States. In none of these cases has a doubt been intimated by the Supreme Court that they were properly cases within the admiralty cognizance. In the case of *Fretz v. Bull et al.*, before cited, damages were allowed against the owners of a steamboat for running into and sinking a flat-boat. This was a case of collision, in which the jurisdiction is much more doubtful as to the property concerned than in cases for salvage. The cases of *Culbertson v. Shaw*, 18 Howard, 585, and *Nelson et al. v. Leland et al.*, 22 Howard, 48, were of collisions by steamers with flat-boats or barges. Surely if such boats as these could be made the subject of admiralty jurisdiction by libels for collision, a derrick-boat may be held to be a proper subject for a libel for salvage. I so hold in the present case.

As to the merits, the facts seem to be these: the libellant proves an expenditure of money, \$600 in cash, in the work of raising the derrick-boat, and that his wrecking schooner was engaged in and about the job some two weeks, which must have

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been worth \$10 a day, at the least, or \$150. The derrick-boat, I think from all the evidence in the case, must have been worth, when raised, not less than \$2000 or \$2500.

A decree may be taken for \$750 and costs.

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*United States District Court, Eastern District of Virginia, at Norfolk.*

IN THE MATTER OF STETSON, GARRY & COMPANY *v.* THE BARK PEPITA, AND VON LIND & COMPANY *v.* THE SCHOONER WILLIAM SLATER.

Example of collision happening by violation of rule 17 of the rules of navigation.

CROSS-LIBELS in admiralty.

The case was discussed, and decided as follows, by

HUGHES, J.—Since hearing the evidence and arguments in these cases at bar I have given several days to the study of them, not so much because they seemed difficult of decision in themselves, but because of the glaring conflict which displayed itself in the voluminous evidence which was taken, and the necessity I was under to discard as false a good deal of testimony on one side or the other. By sifting the evidence carefully, and planting myself upon facts which do not admit of doubt or dispute, I have made up what I believe to be a true statement of the facts of this controversy, as follows.

The collision which is the subject of controversy took place between the German bark *Pepita* and the American schooner *William Slater*, at 10 A.M., on the 6th of October last, at a point about three and a half miles N.N.W. from Cape Henry, near the intersection of what is called the Bay Channel, coming out from Chesapeake

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Bay, with what is called the Cape Channel, coming out from Hampton Roads. Both vessels were on the port tack, moving under a stiff breeze; the bark heading E. by S. from Old Point Comfort, and the schooner heading S.S.E. from the bay. The wind was from the N., but was baffling between N. by E. and N. by W. The bark was to the leeward, with about three points of the wind free. The schooner was to the windward, with the wind nearly aft. Both vessels were full laden, bound to sea; the bark with resin and flour, the schooner with soft coal. The measured tonnage of the two vessels was nearly the same; that of the bark  $231\frac{79}{100}$  tons, that of the schooner 221 tons. They were both dull sailers, the bark being rather the faster of the two with equally favorable winds. The tide at the time of the collision was in ebb, and had been so for two or more hours. The schooner was moving with a fairer wind at a speed of five to six miles an hour.

The bark, with less favorable wind, was moving at about the same speed, certainly not much greater, except for a few minutes just preceding the collision, when a slight change of her course to the leeward gave her a better wind.

The vessels came together on intersecting courses, which made an angle with each other of twenty-eight to thirty degrees. The crew of each vessel, therefore, naturally supposed the other was overtaking her, whereas they were moving at nearly equal speed to a converging point. The vessels came together at an angle of about forty degrees. The schooner struck the bark's stem and port bow a side blow from the rearward, bending over and splitting her cutwater and wrenching it from the stem, but not bruising it on its starboard side or rubbing the paint on that side. The concussion upon the schooner was upon its starboard quarter, not severe enough to awaken a child sleeping in the cabin, but causing an indentation on the vessel of some six inches in surface and one inch deep. The damage to the bark was such as to require that she should be unloaded for repairs at Norfolk. This was not necessary with the schooner, the damage to which was chiefly in her rigging from fouling with the bow of the bark. As before said, the collision was from the starboard quarter of the schooner striking the port bow and the side of the stem

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of the bark by a glancing blow in a forward direction. All hands were on deck on the bark at the time of and for an hour or more before the collision, and there was a regular lookout on her forecastle deck. There was no lookout on the schooner. The man considered as the lookout was in the rigging at work with the sails. Except the helmsman, there was no one on the deck of the schooner but the master and a young woman passenger with whom he was conversing, and to whom he was pointing out objects of interest in sight until within a moment or two of the collision.

A few minutes before the collision the bark fell off to the leeward from her E. by S. course, to get out of the way of the schooner, although she was near a lee shore. Her helm was aport at the time of the collision. Until a moment or two of the collision the schooner's helm also was aport. Then the master seized it from the helmsman and put it down hard a starboard, but too late to avoid a collision, which happened in consequence of the schooner, with helm aport, running across the bow of the bark. Except this futile and too tardy action of her master, the schooner did nothing to avoid the collision. The case falls within rule 17 of the American rules of navigation, which requires that,

When two sailing ships are crossing so as to involve risk of collision, then . . . . if they have the wind on the same side, or if one of them has the wind aft, the ship which is to windward shall keep out of the way of the ship which is to leeward.

This rule means by "crossing" the coming of two ships towards a point on lines at right angles or on smaller angles with each other. Here one vessel was moving on a S.S.E. course, and the other on an E. by S. course. In consequence of the bark's porting her helm and falling off to the leeward a few minutes before the collision, she may at that moment have been heading E. by S. $\frac{1}{2}$ S., or E.S.E. The duty of the schooner, under the rule 17, was, therefore, to have starboarded her helm some minutes before the collision; but she did nothing until her master, when it had become too late, seized her helm and put it hard down with his knee, just before the moment of collision. The

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schooner being to windward, rule 17 placed the *onus* of starboarding her helm and getting out of the way upon *her*, and required nothing of the bark. The schooner was in fault in not having starboarded her helm in sufficient time before the collision to get out of the way, much more, in having ported it at all, and I will decree accordingly.

It is not inappropriate, before dismissing the subject, to examine somewhat particularly the theory on which the owners of the schooner based their case.

They hold that the case falls under rule 22, which requires that

Every vessel overtaking any other vessel, shall keep out of the way of the last-mentioned vessel.

They accordingly claim, that the bark was behind the schooner; that she was the faster sailer of the two; that she was therefore overtaking the schooner; and that consequently it was the bark's duty to keep out of the way of the schooner. They also insist that the wind was at N.N.W.; that the bark, on coming out from Old Point Comfort to Thimble Light, did not take the Cape Channel out to sea, but kept straight on, on a N.E. by E. course, across the Tail of the Horseshoe, into the Bay Channel; and that she thence came down the Bay Channel to the point of collision, and not down the Cape Channel; and that she was, therefore, to windward of the schooner, and was following and overtaking her some time before the collision, and at the time of collision.

But it is clear, to my judgment, that this theory cannot be reconciled with the indisputable facts of the case.

The official report says, that the wind at Old Point at about 8 A.M. was N. It also shows that at 12 M. the wind was N.W. The schooner's testimony is, that the wind was baffling on the bay. It is fair to infer, therefore, that the wind did not get any further than N.N.W. at any time before 10 A.M., the time of the collision; and that its average point up to 10 o'clock was not west of N. by W. The tide, by the official report, was high at 7.20 A.M., and must have been in ebb from 8 to 10 A.M.

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Now the bark passed Old Point at 8.5 A.M., and got as far as Thimble Light at 8.40. If it continued on in that same course of N.E. by E. across the Tail of the Horseshoe into the Bay Channel, which is a distance of nine miles from Old Point, or six miles from Thimble Light, it had while on that course no point of the wind free, was close-hauled, and could not have moved faster between Thimble Light and the Bay Channel than it had moved between Old Point and Thimble Light. As it had sailed three miles in thirty-five minutes between Old Point and Thimble Light, it would have consumed an hour to seventy minutes in reaching the Bay Channel from Thimble Light, and therefore would not have reached Bay Channel, at a point beyond the Tail of the Horseshoe, about N.E. by E. from Old Point, until 9.45 or 9.40. But this point is five miles from that where the collision happened at 10 o'clock; and the bark could not have gone that distance in the fifteen to twenty minutes which were left to it between 9.40 and 10 A.M. It also seems to me to be simply preposterous to suppose that the master of the bark, who was making his fifteenth voyage from Hampton Roads to Brazil, should, on a beautiful morning in broad day, on a good tide, with a favorable wind, have done so unseamanlike a thing as to leave the direct route of the Cape Channel, to cross over the shallows of the Tail of the Horseshoe, and to get into the Bay Channel, which was out of his course, and several miles farther than the direct route to the Capes.

A theory which requires the court to believe either that the master of the bark *would* have chosen such a route, or that he *could* have accomplished it, and made the collision by 10 o'clock, requires it to abandon the probable and to adopt the improbable and impossible. I cannot do otherwise than discard it; and the failure of this discarded theory is a breakdown of the schooner's case.

NORFOLK, May 30th, 1878.

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*United States District Court, Eastern District of Virginia, at  
Norfolk, January, 1878.*

JOHN L. MERCER v. STEAMER FLORIDA.

Where a vessel lying at anchor in a harbor on proper ground showing lights, is run into by a moving steamer and damaged, the presumption of fault is conclusive against the steamer.

LIBEL in admiralty for damages for collision.

The libel was for a collision by the Florida with the schooner Marion A., and by which the schooner was sunk and her cargo damaged, on the morning of February 17th, 1877, at about six o'clock, on a dark morning, at a point about seventy-five yards south by east of the Red Buoy, which is placed nearly opposite the custom-house on the Portsmouth side, in Norfolk harbor. The loss was about \$1000.

*Mr. Warren G. Elliott and Mr. W. H. C. Ellis, appeared for the libellant.*

*Mr. Charles Sharp, for the respondents.*

The facts of the case are set forth in the decision of the judge, which was as follows :

HUGHES, J.—The cause is one of a steamer coming into a harbor studded with vessels at anchor, and lined with vessels moored at the wharves, in what its witnesses called a dark night, and colliding with a vessel at anchor. A collision by a steamer running into a vessel lying at anchor anywhere, raises the presumption of fault against the steamer ; much stronger is this presumption where the collision is in a harbor at night when and where the utmost caution is required of the moving vessel. And steamers in motion are held to stricter responsibility for fault than sailing vessels in motion ; because of the greater facility with which their navigators can manage them. I need not cite au-

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thority for these obvious propositions. They are well-settled law. On the other hand, I held in the *Everman Case* that in an open roadstead several miles square, where there was no harbor-master and no known or conceded line of channel, a vessel might anchor anywhere at will. While that is emphatically the case in Hampton Roads, it is not the case in the harbor of Norfolk and Portsmouth, deep water in which constitutes a channel in most of the harbor of only the width of a few hundred yards. Here they have a harbor-master, who ought to be held to a very strict attention to his work and to an unremitted discharge of his duty day and night. He ought to be an active, energetic, ever-watchful, never-negligent, earnestly-faithful man to his duties. Any other sort of harbor-master will be the cause of frequent collisions, much dissatisfaction to navigators frequenting the port, and continual and indefinite injury to the commerce of the two cities.

I say that a harbor-master is here who ought to be on hand to assign vessels to proper and safe places of anchorage at all times. A vessel placed at anchor by him is presumptively free from fault as to the place of lying at anchor. Vessels, indeed, must often cast anchor at times when they cannot avail of the services of the harbor-master. A vessel which casts anchor at such a time selects its place of anchorage on its own responsibility. If a vessel anchors at an improper place anywhere it is at fault, though if a steamer run into her when thus at fault the presumption is against the steamer, and the burden of proof is upon the steamer to show the fault of the vessel. If a vessel chooses a wrong anchorage in a much-frequented and narrow harbor it will be held to more strict responsibility, and to be more violently in fault, because of its being in a harbor; but if she is run into by a steamer while lying there the presumption will be violently against the steamer, and the burden of proving fault in the vessel will rest still upon the steamer.

It is for the interest of all that settled rules of law on these subjects should be enforced. It will not do to say that the public interest of a city requires that steamers should be favored by the courts at the expense of smaller craft. Nor will it do on the other hand to maintain that men of small means and having small properties, like sloops and schooners, ought to be favored by

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the courts at the expense of wealthy companies owning great steamers. Ideas of what class of vessels do most service to the public cannot enter into the deliberations of a court in cases of collision. Neither class of vessels can be allowed to proceed upon the notion that the other class has no right which it is bound to respect.

If steamers run out of the channel or too close to the edge of the channel of a harbor, and in doing so strike a vessel at anchor, it will be always held in this court to be responsible for the consequences. It has no right to try experiments of nice running in a narrow and much-frequented harbor. It must seek the middle of the channel, and not swerve from it if possible.

On the other hand, vessels cannot be countenanced by the court in anchoring within the channel. Their duty is to get on the edge of it or out of it. If they obstruct the channel they must not expect to recover damages if they are run down or run into by vessels in motion. The master of a vessel may think it will do no harm for his vessel alone to anchor in the channel, it being very easy for a steamer to go around one vessel. But the exercise of such a liberty by one vessel demoralizes the whole discipline of a harbor, and no one vessel has a right to take a position in which, if a hundred other vessels took like positions, there would be an obstruction of navigation. Example is always contagious, especially vicious example.

I think I have said enough to indicate that I consider this case to turn entirely upon one single question; and that is, whether the *Marion A.* was anchored in the channel too far from the edge of it at the time of the collision. As to the light, the *Florida's* witnesses only say that they did not see a light on the schooner. But the testimony of the witnesses of the schooner is positive, consistent, and outspoken on that point. Captain Dehart saw the light was put up, the seaman Post testifies that it was put up, and Mr. Robert Mercer saw it hanging and burning after the collision. Nor is it worth while to consider the point made by claimant's counsel as to the lookout of the *Marion A.* A vessel must have proper lookouts until she is anchored, and is always held strictly to the duty of keeping a lookout when not anchored; but when once anchored the lookout, who is an officer of navigation

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on a vessel in motion, becomes then a mere watchman for purposes of patrol, protection, and warning on the anchored vessel. So that the case turns solely upon the question: Where was this schooner anchored?

The libel recites that, at the time of the collision, the Marion A. was lying "just south of the Red Buoy," which is fixed on the edge of the channel on the Portsmouth side. The answer admits and alleges that "the point at which said schooner was then anchored is about south by east of said buoy, and about midway between the cities of Norfolk and Portsmouth, to the southward of the United States custom-house at Norfolk." Without reciting and commenting upon the evidence of each witness who testified in the case on this point, I think I can safely say that their evidence on either side is substantially epitomized in the language I have quoted from the libel and answer.

I shall take the position of the schooner at anchor to be that assigned to it by the answer; which was deliberately drawn and intelligently and deliberately sworn to by Captain Dawes. The only point left open to doubt by the allegation of the answer is as to the distance at which the schooner lay from the Red Buoy on the course of south by east. The schooner's testimony is that this distance was fifty yards, though Hubbard places it at one hundred and fifty yards. I shall assume that it was a hundred yards, and this distance would place it about due south of the custom-house.

I have no better guide in ascertaining the position of the schooner from these data than the official chart of the harbor made by the officers of the United States Coast Survey, a copy of which I have before me.

The testimony of witnesses as to depth of water is always perplexingly inaccurate; and there is no safe guide but the charts. The official chart gives a channel north of the Red Buoy of more than three hundred yards in width, clear of wharves, slips, and docks. All these charts lay down three dotted lines: one representing the line of six feet depth of water on each side of the channel; another of twelve feet depth; and the third of eighteen feet depth. The channel of Norfolk harbor, north of the Red Buoy, between the two lines of eighteen feet depth, is about three hundred yards

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in width, and from twenty-five to forty-two feet in depth. The Red Buoy sits south of the channel on the Portsmouth side, and a little south of the line of twelve feet water on that side. I have drawn a red line from the Red Buoy on the chart, on the course of south by east. This line intersects the line of twelve feet water at a distance of about 100 yards from the Red Buoy, and intersects the line of eighteen feet water at a distance of 300 yards from that buoy. If, therefore, the schooner was lying anywhere within a distance of 100 yards wide from the buoy on a south-by-east course, it was within the line of twelve feet water, and there was an open, free channel north of it nearly 400 yards and 12 to 42 feet deep. If the schooner was lying anywhere within 300 yards of the Red Buoy on this south-by-east course, it was within the line of eighteen feet water, and there was an open, free channel north of her of 300 yards in width and 18 to 42 feet in depth. The schooner was south of the line of twelve feet water, and outside of the principal main channel of navigation in the harbor. It would have been more prudent for it to have been farther south, and on the flats, because steamers drawing less than twelve feet water could follow it and strike it where it was; but, still, it was not in the channel, and scarcely on the edge of the channel, properly so called, at the point at which it was actually lying.

But this does not constitute a *fault* in the schooner. All that could possibly be claimed is, that it was an *imprudence* in view of the fact that steamers often run outside of the main channel in running short cuts to their points of destination. The schooner, therefore, was not legally in fault.

The next question is, whether the steamer had a right to run close to the south edge of the channel in a harbor where that edge is the usual anchoring ground of shipping, and on a dark morning, when the utmost caution was incumbent on the steamer, and when it was most especially her duty to avoid all risk and keep to the middle of the channel. The officers of the Florida account for her running in the direction of the schooner by referring to the position in which a Norwegian bark was then lying at anchor. I judge, from what has been stated in evidence, though that was very uncertain and unreliable, that the Norwegian bark was

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Opinion of the court.

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lying southeast of the Red Buoy on the line of eighteen feet water. But even if she had been much farther north, and entirely out in the channel, there was room in a channel three hundred yards wide for the Florida to pass to the north of the bark. At all events the schooner cannot be held for the fault of the Norwegian bark. It was the duty of the harbor-master to require the bark to change her position ; and both the harbor-master and the bark are blamable for the bark's position. But their fault did not relieve the steamer from the duty on such a night, and coming into a small harbor, to keep in the middle of the channel.

I feel called upon to make another remark. The Florida was moving into the harbor at a speed too great to check up and stop in the distance of about a hundred yards. It is very difficult for the officers of steamers to realize the fact that they have no legal right to run through a harbor at that speed. It is so seldom that harm occurs in doing so, and it is so customary with steamers to run at such speed, that habit passes with them for law, and they come to believe that such speed is legally allowable. The law of navigation for steamers moving in harbors is : that they must run at a speed under which they can check up within a much shorter space than a hundred yards. This is especially incumbent upon them when entering a harbor filled with vessels on a dark night. The Florida ought to have crept along feeling her way at the slowest speed.

I make this as a general remark, and do not lay stress, in this case, upon the speed at which the Florida was running. The steamer was in fault ; but the fault consisted in leaving a channel three hundred yards wide and running along the edge of it, in or within the south line of twelve feet water. See *The Granite State*, 3 Wallace, 310.

The decree must be against the steamer or its stipulators.

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Opinion of the court.

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*United States Circuit Court, District of Maryland, at Baltimore,  
July 5th, 1879.*

JAMES W. MCCREADY v. THE SCHOONER ROBERT I. POULSON.

Where a vessel sailing without a light collides with another properly navigated and equipped, the fault is hers, and she must bear the loss.

IN admiralty.

BOND, J.—This cause having been heard and considered, the court doth find the facts to be, that the libellant was the owner, on the 4th day of January, 1878, of the sloop Sirocco, which at that time was sailing up the Chesapeake Bay, from Mob Jack Bay to Baltimore, with a cargo of oysters. At about 2 A.M. of that day she saw approaching her the schooner Robert I. Poulson, with which she collided, and was a total loss. And the court finds that the schooner Robert I. Poulson was properly navigated and equipped, and that the sloop had no light, and that the collision was caused by that fact.

And it finds the conclusion of law to be that where a collision occurs by the fault of one vessel only, it must pay all damages and bear all the loss.

And it will be so decreed.

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*In the District Court of the United States, for the District of  
Maryland.*

EDWARD HATTON ET AL. v. SCHOONER MELITA.

The relative priorities and dignities of many claims upon the same vessel asserted by libels and petitions, composed, adjusted, and settled in a careful opinion by the court.

LIBEL for supplies and repairs.

GILES, J.—The original libel was filed in this court by Messrs. Hatton and others, of the city of New York, on the

30th January, 1869, against the said schooner, to recover the sum of \$445.10 for supplies furnished said vessel, in October and November, 1868. The libel states that said vessel belonged to citizens of Great Britain, residents of Nova Scotia. The vessel at that time was in the custody of the sheriff of Baltimore city, under an attachment issued out of the Superior Court, at the instance of James P. Melledge and others, mortgagees, which was not released until the 16th of February, 1869, when the marshal took possession of her under the process served in this case. Before this process was served, six other libels were filed in this court against said schooner: one, on the 11th of February, 1869, by Timothy L. Mays and Nathaniel Tarr, of Boston, to recover the sum of \$37.40 for supplies furnished said schooner in October, 1868; one by Robert Miller, of Boston, to recover \$30 for repairing the sails of the said vessel in March, 1866; one by Dicks & Potter, of Boston, on the 11th of February, 1869, to recover the sum of \$200 for sails furnished to said vessel; one by Loud & Co. of same date to recover the sum of \$57 for supplies furnished said vessel in January, 1869, in this port; one by William D. Beckford to recover the sum of \$993.55 for supplies furnished said vessel in 1866 and 1867, at Boston; and one by the mate and seamen to recover the wages due them for services on said vessel. Besides these libels, several petitions were filed in this case by materialmen, claiming to have liens on said vessel, and praying to be made parties to this case. They are David B. Small, Kelsey, Gray & Co., and others, and this court, by its order passed the 17th of March, 1869, ordered all these libels and petitions to be consolidated with this case.

Previously to that, on the 19th of February, 1869, this court, on the petition of libellants, and with the consent of said creditors and of the captain and half-owner of said vessel, passed an order for the sale of the said vessel, and which was carried into execution by a sale of the said vessel by the marshal on the 27th day of February, 1869, and the net proceeds of sale, to wit, the sum of \$3641.57 were deposited in the registry of the court, to await its future order. On the 27th of March, 1869, the court passed a decree in case of the mate and seamen against said vessel, in their favor, ordering that the sums adjudged by the said

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decree to be due to them should be paid to them out of the proceeds of the sale of said vessel in the registry of the court. The amount thus paid was \$727.29, leaving only the sum of \$2914.28 to meet all the other claims made against said vessel. Besides these claims, a claim was filed by the captain of said vessel for wages due him, which he claimed to be a lien on said vessel by the laws of Great Britain ; and a claim was also filed by Messrs. Tucker & Co., of this city, for damages which they suffered by the delay in delivering a cargo shipped by them on board said vessel on the 23d day of January, 1869, to be transported to Trinidad, in the West Indies, and which was not delivered until the 4th of April, 1869, owing to the fact, that the vessel did not leave this port until the 4th of March, 1869, more than a month after the time she should have sailed. A claim was also filed, by Messrs. Melledge & Co., of Boston, to recover the sum of \$2165.40, balance due them for supplies, and furnished to said vessel at various times from 1864 to 1869, and for which they held a mortgage of said vessel, and also an agreement with her captain and half-owner by which they received the freights of said vessel. The mortgage was executed the 27th of January, 1868; and is made to secure the payment of \$3800 alleged to have been loaned to the owners of said schooner by the said Melledge & Co. And the agreement bears date the 7th of July, 1868.

As all these several claims amount to much more than the balance of the proceeds of the sale of the said vessel, it becomes necessary for the court to marshal the assets and to decide who, if any, of these various claimants are to be preferred, and to have priority in the distribution of these assets. The questions growing out of these facts have been argued with great ability by the learned counsel representing the various claimants. It has been contended on the part of the claimants, Messrs. Tucker & Co., that the captain, who was one-half owner of the said schooner, has no lien against any of the claimants, and this is the first question that presents itself in the consideration of this case. As captain he contracted for the supplies made to this vessel, and as half-owner he is liable *in solido* for the amounts severally due to the various materialmen who are claimants in this case. He also made the contract of affreightment with the Messrs. Tucker,

and as owner is responsible to them for its due performance; I therefore hold, that although by the present law of England he as captain would have a lien for his wages, yet as in this case he is also one-half owner, he has no lien as against the creditors I have named. The second question is, Have the mortgagees, Messrs. Melledge & Co., any lien? Now, although mortgagees have no standing in a court of admiralty to enforce their mortgage claim by original libel, yet they may be allowed payment out of surplus funds in admiralty, for the proceeds of a mortgaged vessel, sold by decree of the court. But this is only allowed after the payment of all prior liens on said vessel. And I held, in 1855, in the case of *Reede v. Steamship George's Creek*, that subsequent liens obtained by materialmen for necessary supplies or repairs took priority over a prior recorded mortgage. Now although a part of the amount secured by the Messrs. Melledge & Co. was for supplies furnished to the said vessel, yet upon an examination of their account filed by them it will be found that said amount is fully paid by the cash and freights received by them, the balance of said account being for charges for material and commission, which under no circumstances of the case could ever be held a lien on the vessel. Indeed, it is doubtful whether, independent of the mortgage, Messrs. Melledge & Co. would have any lien on said vessel or its proceeds for any part of their said claim, or that this court would have jurisdiction of such a case, as the account shows them to have been the general agents and factors of the owners of said vessel. See case of *Mertun v. Maynard and others*, 17 Howard, 477. Their petition, like that of the captain's, must also be dismissed. We come now to the next question, Have the materialmen any lien for their supplies and repairs? Libellants reside in New York, where the supplies charged for in their account were furnished to the said vessel, belonging to New Brunswick. Several of the other materialmen reside in Boston, where certain other supplies were furnished, and others reside in our city. The supplies furnished by those materialmen who reside in New York and in Boston were furnished to said schooner on previous voyages from New Brunswick to Boston and New York; and the supplies furnished by the claimants who reside in this city were furnished a short

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time before her seizure and sale in this case, to fit her for her then contemplated voyage. The amount due to these last is as follows :

To Messrs. Kelsey & Gray, . . . . .	\$24 17
To John Hermon, . . . . .	12 95
To Lander & Waddy, . . . . .	11 83
To Loud, Claridge & Co., . . . . .	56 90
To David B. Small, . . . . .	16 00
To William Harris, . . . . .	3 75
To C. H. Lange, . . . . .	4 00

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\$129 60 in all.

All these supplies are proved to have been necessary and proper at the several times they were furnished, and that they could only have been procured by the credit of the vessel. Are they a lien upon the vessel? The learned counsel for Messrs. Tucker & Co., with their usual ability, have argued that, although these supplies were furnished in an American port where the general maritime law prevails, yet, inasmuch as this was a British vessel, there is no implied lien on it. That the lien only arises from the power of the master to make or create it, and as by the laws of England he possesses no such power save by a bottomry bond, there was no tacit lien in this case. I take a different view of the law. The first question is, By what law is this to be decided? By the law of the domicil of the owner, or by the *lex loci contractus*? Says Justice Story, in his great work on the Conflict of Laws (a work not only the most learned, but at the same time the most practical of any I have ever read), in section 322, in which he is treating of the effects of contracts, that “they, like the validity of contracts, are dependent upon and are to be governed by the *lex loci contractus*.” And after enumerating various cases which are thus governed and controlled, he says, “In these and the like cases, where the lien or privilege is created by the *lex loci contractus*, it will generally though not universally be respected and enforced in all places where the property is found, or where the right can be beneficially enforced by the *lex fori*.” And in section 401 he says, “That by the general maritime law, acknowledged in most if not in all commercial countries,

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hypothecations and liens are recognized to exist for seamen's wages, and for repairs of foreign ships, and for salvage." And in section 402 he says: "Upon the general principles already stated, as to the operation of contracts, and the rule that vessels have no locality, it would seem that these privileges, hypothecations and liens, ought to prevail over the rights of subsequent purchasers and creditors in every other country." Until recently in England the Court of Admiralty, being restrained by the jealousy of the common-law courts, could not enforce such liens. But by the statute of 3 and 4 Victoria, chap. 65, sec. 6, that court has now ample jurisdiction over such cases. And this was the view taken of the law by the Supreme Court in the case of *The General Smith*, 4 Wheaton, 438. Justice Story, in delivering the opinion of the court in that case, says: "Where repairs have been made, or necessities have been furnished to a foreign ship, or to a ship in a port of the state to which she does not belong, the general maritime, following the civil law, gives the party a lien on the ship itself for his security, and he may well maintain a suit *in rem* in admiralty to enforce his right." It would be a useless waste of time to cite the many decisions at the circuits in which the courts have acted upon and enforced this view of the law.

In opposition to this principle, I have been referred to only three cases: one in England and two in this country. First, as to the one in England, *Stambach v. Fleming*, 6 English Law and Equity, 412 (and there is a similar case, growing out of the same transactions, reported in 20 English Law and Equity, 547). These cases, which are alluded to by Justice Curtis in the case of *Thomas v. Osborn*, also cited by the counsel, were actions on policies of insurance; and the question was, Whether the plaintiffs had an insurable interest in the vessel under the assignment executed by the captain? He undertook to convey the vessel as a security for repairs and supplies furnished in Canada to this vessel, whose owners resided in England. It will be seen, that where the supplies were furnished, as well as where the owners resided, the laws of England prevailed. But, says Judge Curtis, in full view of the only other case cited (*Pope v. Nickerson*, 3 Story, 465),

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“Neither of those learned courts considered what should be the effect, in an English tribunal, of the law of the place where the repairs and supplies were obtained, if that law tacitly created a lien on the vessel.” It will be found on examining the case of *Pope v. Nickerson*, that it was an action of assumpsit on four bills of lading signed by the master of a schooner belonging to the defendants, for fruit, and were shipped on board of her at Malaga, and consigned to plaintiffs at Philadelphia. No such question as the one I am discussing arose in the case. The question was, “By what law were the bills of lading to be governed as to their obligation and extent upon the owners,” whether by the law of Spain, where the contracts of shipment were made, or by the law of Pennsylvania, where the goods were to be delivered, or by the law of Massachusetts, where the owners resided, and to which the vessel belonged? And that learned judge, after a long and full discussion of the question, arrived at the conclusion, that the extent of the responsibility of the owners was to be measured by the law of Massachusetts, and not by the law of Spain or Pennsylvania. This case is so different from the one I am now to decide, that I shall not further consider it. The same learned judge, in the case of *The Jerusalem*, 2 Gallison, 349 (very early in that judicial career which reflected so much credit on himself and the high tribunal in which he sat), had maintained the same principle of admiralty law which he enunciated in 4 Wheaton. He says: “It will be recollected that this is a foreign ship, and that by the general maritime law, every contract of the master for repairs and supplies imports an hypothecation.” Says Chancellor Kent, in his great work (3 Kent’s Com., marginal paging, 168): “The civil law and the law of those countries which have adopted its principles, give a lien upon the ship, without any express contract for such a claim, to the person who repairs or fits out the ship, or advances money for that purpose, whether abroad or at home. The English law allows of such a lien, from the necessity of the case, for repairs and necessities while the ship is abroad, but it is not adopted as to repairs and supplies furnished at home.” And in support of this principle the learned chancellor refers to many decisions in the English

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courts which fully sustain him. I hold, therefore, in this case that the rights of these materialmen are to be judged of by the general maritime law which is recognized and adopted in our American courts. And by that law, as I understand it, the repairs and supplies furnished to fit this vessel for her last voyage have a priority over the claim for repairs and supplies furnished to fit the vessel for previous voyages. We come now to consider the last question, Have the Messrs. Tucker any claim to the proceeds now in the registry? The facts out of which their claim arises, are briefly these:

On the 23d of January, 1869, they shipped on board said vessel a cargo of flour and other articles to be carried for them to Trinidad, one of the West India Islands, and they paid on account of the freight the sum of \$319, gold. Owing to the attachment and subsequent sale of the vessel hereinbefore stated, she did not leave this port until the 4th of March, 1869, and only reached Trinidad on the 4th of April, 1869. She was bound to have sailed with all reasonable dispatch. If she had sailed on the 24th of January, she ought to have arrived at Trinidad about the 23d of February. She lost more than a month by the delay. The cargo would have sold for much more money, had she sailed and arrived in due time, than it brought on the 4th of April, 1869, on its arrival. And for this difference with interest the Messrs. Tucker file their petition. Had they a lien on the vessel? No one can doubt that. By all the writers on admiralty law it is recognized. Says Parsons, in his last work on Shipping and Admiralty, vol. 2, page 251: "The owner of the cargo has a lien on the ship for any injury he may sustain by the fault of the ship or the master." But it is contended by the learned counsel for the libellants, that the Messrs. Tucker had no right to let their cargo remain on board so long while the vessel was in the custody of the marshal; that they ought to have procured another vessel. Now it is perfectly clear by all the principles of law applicable to such a case, that they had no right to consider the voyage as broken up until the sale by the marshal. This took place on the 27th of February. Up to that time they had every reason to believe, from the daily representations of the

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captain, that the vessel would be released, and proceed on her voyage. When the sale took place the voyage was broken up, and the owner was bound in good faith not to let his cargo remain here any longer, and subject the shipowner to any additional damage. Now, under this obligation, did not the Messrs. Tucker do the very best thing they could to expedite the delivery of their cargo at Trinidad? It was then on board the Melita. It would have taken in all probability more than five days to have procured another vessel, and transshipped the cargo. The Melita had to be supplied with some new sails, which took four days, and on the morning of the fifth day, after the sale by the marshal, she departed for Trinidad. I think the Messrs. Tucker have a valid claim upon these proceeds in the registry for whatever damages they may be found to have suffered by the delay I have mentioned, with interest from the 4th of April, 1869, to the date of the decree. Now what is the measure of damages in such a case? Says Parsons, in the work to which I have already referred (vol. 1, page 271): "In an action against a carrier for undue delay in the delivery of goods, where they had fallen in value from the time when they ought to have been delivered, it was held that the diminution of value could be recovered as damages." The same rule is held in 2 Story, 81; 6 Ohio, 358; and 12 Sergeant & Rawle, 188.

Have the shippers any priority over the materialmen? As between them and the Baltimore claimants this question is not necessary to be raised, as there will be money enough to pay both. And from what I have already said, it is perfectly clear, to my own mind at least, that they both have priority over the New York and Boston claimants, who claim for supplies furnished to this vessel on previous voyages.

But it may be interesting to the profession to know that there is very high authority for the principle that the shipper, under the circumstances of this case, would take precedence in payment, next to the seamen for their wages. Judge Ware, in the case of *The Rebecca* (Ware's Rep. 193), and Judge Betts, in the case of *Juste Pon and others v. Proceeds of the Brig Arbustci* (6 Am. Law Register, 511), recognize this doctrine. It only remains for me

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from the evidence to ascertain the damages due to the Messrs. Tucker. They have examined two witnesses in Trinidad: one, George Spiers, the consignee of the cargo; the other, William Norman, a merchant of Trinidad. The estimate of Mr. Norman does not embrace all the articles of the cargo. Mr. Spiers makes the difference between what the cargo would have sold for on the 15th of February, 1869, and what it brought on the 4th of April to be \$1173.30 in gold. But then my impression is, that we must allow at least thirty days for the voyage from this port to Trinidad, as that was the time actually consumed, so that she should have arrived out on the 23d of February; and we must take the prices of that date, as compared with what the cargo brought on the 4th of April. I have, therefore, made a close examination of the price-currents filed with the commission from Trinidad, and I think I shall be right in allowing the loss of the Messrs. Tucker to be \$1000 in gold, to which add the freight prepaid, \$319, and we have the sum of \$1319 due the shippers on the 4th of April, 1869; now add nine months and twenty days' interest to that sum, and we have the sum of \$1382.50 due them on the 24th of January, 1870.

Now the shipowners would have the clear right to tender to the shippers on the day of the trial of this case that amount in gold; and if this was an action *in personam*, the decree of this court would be for that amount in coin; but as the funds in the registry of this court are in currency, and out of that fund the shippers must be paid, I must decree that they be paid such a sum in currency as will represent the amount due them in gold on the day of the decree. At the price of gold yesterday ( $121\frac{3}{8}$ ) that sum will be \$1681.47. To this add the *costs of their commission*. After these sums are deducted, as also the several sums due the Baltimore claimants and the costs of this case, the balance of the moneys will be distributed among the other claimants ratably.

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*United States Circuit Court, District of Maryland, at Baltimore,  
July, 1879.*

JOSEPH E. BOGGS ET AL. v. ISRAEL M. PARR AND HENRY A.  
PARR.

Example where both vessels are in fault in a collision, and the damages are divided.

IN admiralty.

BOND, J.—This cause having been heard and considered the court doth find the facts to be that the libellants are the owners of the schooner *Virginia* and her cargo ; and that the respondents are the owners of the steam-propeller *Ruggles*. That between eleven and twelve o'clock on the night of March 1st, 1878, the *Virginia* was proceeding up the Chesapeake Bay on a voyage from Accomac County, Virginia, to Baltimore, and the *Ruggles* was proceeding on a voyage in an opposite direction down the bay. Each of these vessels saw each other at the distance of a mile or a mile and a half before they collided, but the schooner was navigated in an unseamanlike manner, and instead of holding her course changed it once or twice and brought about the collision by which she was sunk. But the court finds that when the steamer saw the unskilful and dangerous way in which the schooner was being navigated, she did not use due and timely caution nor proper measures to prevent the impending danger. And the court finds the loss and damage to have been to the schooner and cargo twenty-six hundred and eight dollars.

And it finds the conclusion of law to be that where a collision is caused by the fault of each vessel the damages and costs are to be equally divided. And a decree will be entered accordingly.

It is, therefore, this 5th day of July, A.D. 1879, adjudged, ordered, and decreed that the libellants recover of the respondents the sum of thirteen hundred and four dollars, and that the costs of the case be divided, each party paying one-half thereof.

*United States Circuit Court, District of Maryland, at Baltimore.*

. MORTON BEYER ET AL. v. THE STEAMER NURNBERG.

A vessel lying at anchor in a fairway or roadstead of a navigable water, with no anchor-lights burning, and but one lookout, and he asleep, at the time a steamer runs into her by no fault of the steamer, is solely in fault and must bear the loss from the collision.

BOND, J.—This cause standing ready and having been submitted for hearing, and the proceedings and evidence in the cause and the arguments of the proctors for the respective parties having been read, heard, and duly considered, the Circuit Court of the United States for the District of Maryland hereby finds the following facts and conclusions of law, upon which it renders its decree, viz.:

FACTS FOUND BY THE COURT.

1st. Between twelve and one o'clock on the night of the 7th, or morning of the 8th, of May, 1877, a collision occurred between the steamer Nurnberg and the bark Azow in the Chesapeake Bay.

2d. At the time of said collision, the said bark Azow was anchored in a roadstead or fairway of the Chesapeake Bay in the usual path or track of steamers and large sail vessels coming to or going from the port of Baltimore.

3d. An anchor-lantern had been lighted and properly hung on said bark Azow at an early hour of said night, but said light had gone out before said collision, and at the time of said collision no anchor-light nor other light was on said bark, and said bark could not herself be seen by them on board of said steamer at a sufficient distance to enable them to avoid her.

4th. Only one man was on duty as an anchor-watch on board said bark Azow at the time of said collision, the entire crew having been on duty all the night before. All except the anchor-

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watch were asleep below, and the anchor-watch himself was asleep at the time of the collision.

5th. No torchlight or other light was exhibited on said bark, or other warning given on board of her as said steamer approached.

6th. Said steamer had all her regulation lights burning brightly. They were all visible at the respective distances required by the act of Congress and the usages of the sea, and they might all have been seen by a watch on lookout on board of said bark in time to ward off said steamer and prevent a collision.

7th. Said steamer, at the time of said collision, was proceeding at less than her usual rate of speed, on her proper course up the Chesapeake Bay, to the port of Baltimore.

8th. There was nothing in the character of the night or in the locality of said collision to have rendered it imprudent or improper for said steamer to proceed at her customary rate of speed if she had chosen to do so.

9th. At the time of said collision said steamer was in charge of a competent, experienced, and skilful pilot; said pilot, her master, and second officer, were on the bridge navigating said steamer, and diligently engaged in looking out. A full seawatch, consisting of nineteen men and officers, were assigned to their respective duties; twelve of her crew were on watch forward of the bridge. Two able seamen were assigned to and engaged in the special duties of lookouts. They were stationed forward, on the upper deck, as near as possible to the bow, one on the port, one on the starboard, and all in the positions most advantageous for the discharge of their respective duties. All of these officers and men diligently and skilfully discharged their respective duties from the time said steamer left her anchorage, a little after twelve o'clock on the night in question, in charge of the pilot, up to the moment of the collision. They saw lights on board of other vessels, in motion and at anchor, and avoided and passed them at safe distances. Shortly before said collision two anchor-lights on board of other vessels, one nearly ahead of said steamer and the other a little on her port, about three miles off,

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were reported by the lookouts on board of said steamer, and both of them were distinctly seen by the pilot and officers on the bridge. When the steamer was drawing near to the said vessel ahead, the pilot and officers on her bridge looked to see whether there was anything in the way to prevent them from porting for the purpose of clearing her. None of them seeing anything in their way, the said steamer was ported, slightly altering her course so as to clear said vessel ahead. Before she had got well on her new course the two lookouts saw the bark Azow without any lights on her, and simultaneously, in a sharp and frightened voice, cried out: "Ship right ahead." The order was instantly given to stop said steamer, and put her helm hard aport. Both of these orders were instantly obeyed. But before said steamer could be stopped, and before her machinery could be reversed, or her course materially altered, she struck said bark with such force as to cut into and sink her.

10th. Said collision was caused entirely by the fault of those on board of said bark Azow, and everything was done on board of said steamer Nurnberg which could have been done to avoid it.

## CONCLUSIONS OF LAW.

Said collision having been caused entirely by the fault of those on board of said bark Azow, and everything having been done which could have been done on board said steamer to avoid the same, the libellants, owners of said bark, are not entitled to recover from the said steamer, or from the stipulators, damage therefor.

## DECREE.

It is thereupon, this fifth day of March, 1879, adjudged, ordered, and decreed that the decree in the above cause be, and the same is hereby affirmed, and that the libel be, and the same is, hereby dismissed, with costs to the appellee in both courts.

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*In the Circuit Court of the United States for the District of  
Maryland, at Baltimore, January 14th, 1879.*

AUGUSTUS JEROME ET AL. v. THE FLOATING-DOCK OF  
WILLIAM T. CLARK.

Damage from collision by inevitable accident each party to bear his own loss.

IN admiralty, on appeal.

BOND, J.—This cause coming on to be heard upon the libel and answer filed, with the proofs and testimony taken therein, was argued by counsel, and thereupon, after due consideration, the court doth find the facts to be :

1st. That on the seventeenth day of September, 1876, the schooner *Ida C. Latham*, a vessel of the burden of 492 tons, was lying securely moored at her wharf in the harbor of Baltimore, when at about the hour of six o'clock in the afternoon she was struck in her stern by the floating-dock belonging to William T. Clark, torn from her moorings, and much damage inflicted upon her.

2d. That the floating-dock of Clark was moored to a wharf securely, and with sufficient care to resist the effect of any storm of wind or sea ever known before in that harbor.

3d. That the day being Sunday the hands who work at the dock had gone home, there being no shelter on it for the men.

4th. That about four o'clock the wind began to blow from the southeast, and in an hour increased to a gale of such violence as to make the water rise in the harbor to a height greatly beyond the point ever before known there.

5th. That the dock was fastened by hawsers and chains to piles driven through the wharf into the bed of the basin, but the water rose so high that it lifted the dock above the piles to which it was fastened; this caused the hawsers to slip over the top of the piles, and the dock was driven violently across the basin to where the schooner *Ida C. Latham* was moored, and colliding

with her damaged her to the amount of one hundred and seventy dollars.

6th. And the court finds that the collision was caused by the unprecedented character of the storm at the time, and not by the want of prudence, skill, or care of the owners or crew of the dock. That it occurred by the act of God, and not from negligence or want of precaution.

And the court doth find the law to be that in case of collision arising under the above facts each party must bear his own loss.

It is ordered that the decree of the District Court be reversed, and that the libel be dismissed, each party paying his own costs.

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*In the United States Circuit Court for the Fourth Circuit and Eastern District of Virginia, at Richmond, 1850.*

UNITED STATES v. EDWARD CLEMENTS AND THOMAS REID.\*

In joint indictments one of the accused is not a competent witness for the others, unless he have been acquitted.

On motions for new trial in criminal cases affidavits of jurors ought not to be received to impeach their own verdict.

ON the 4th of February, 1850, the schooner J. B. Lindsey, Captain S. S. Riggs, came into the port of St. Thomas, West Indies, with signals of distress, and on landing, the captain and two men, who composed the whole crew, reported that while at sea near Trinidad, the mate, John Heeney, and a passenger named John Walker, had been murdered by two of the crew, named Edward Clements and Thomas Reid, who had afterwards left the schooner in an open boat, and they were supposed to have landed somewhere on the Spanish main.

The American commercial agent at St. Thomas, Charles H.

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\* Taken from Howison's Trials, published in 1851.

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Trial of Edward Clements and Thomas Reid.

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Delavan, Esq., took prompt measures for their discovery and arrest. He had handbills printed and extensively circulated, in which the men were described, and a reward of two hundred dollars was offered for their apprehension. Mr. Delavan addressed a letter to Louis Baker, Esq., American consul at Laguayra, Venezuela, inclosing one of the handbills, and earnestly asking his attention to the subject.

In a very short time the following letter was received by the chief of police at Laguayra, from the custom-house officer at Higuirote, a small port on the Atlantic, not far from Laguayra:

(TRANSLATION.)

CUSTOM-HOUSE, REPUBLIC OF VENEZUELA, COMPTROLLER'S OFFICE,  
HIGUIROTE, February 11th, 1850.

TO THE MAYOR OF THE COUNTY, LAGUAYRA:

I have passed to the honorable secretary of state on this day, under the number of 73, a communication where I inform him that a boat had reached this port with two Englishmen, who stated they came from Maracaibo in five days of navigation, and as they have not presented any document that will justify what they say, or the place they started from, and it being very strange that a small boat should have made such a long navigation as that from Maracaibo to this port, and having stated that their voyage was for Laguayra, this custom-house has ordered the two Englishmen to pass to the port of Laguayra in the Venezuelan sloop St. Johns, Captain Elestino Ganis, and that they be presented to the mayor, so that they may be examined, and that their consul may make convenient investigation, for no civil authority whatever is in this port now that could do it. The boat, with its appurtenances, remains in this port, which you will dispose of, though said Englishmen have offered it for sale for the sum of forty dollars. I remain your obedient servant,

JUAN JOSE FERRAI.

When these men arrived in Laguayra Consul Baker saw them, and comparing them with the description in the handbill, was convinced they were the same therein mentioned. He immediately wrote to Mr. Delavan, who communicated with Commodore Parker, of the United States West India Squadron, and the sloop-of-war Germantown, Commander Charles Lowndes, was sent to Laguayra. In the meantime, by request of Mr. Baker,

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the boat, with two pistols, a dirk knife, and some other things found in it, was sent from Higuirote to Laguayra.

On the arrival of the Germantown, Lemuel Franklin and James Jackson, two of her crew, recognized the two men as Edward Clements and Thomas Reid, with whom they had served aboard the United States sloop Saratoga at Norfolk. Judicial examinations were made by the Venezuelan authorities; the Tribunal of Justice took the depositions of witnesses and certified them to the office of the American consulate. In one of these depositions James Jackson testified:

“Que habiendo ahora dias ido á la carcél le preguntaron duos individuos que se decia a bordo de ellos; que si sabia lo que les harian; que el esponente entonces les pregunto si era cierto que habian matado el piloto y el pasajero, y Clements le contesto; qui si no habiera sido por tres botellas di Brandi que tenian abordo no habiera sucedido nada; pero como el piloto le pego con un pasador, lo mato con un cuchillo; que entonces el pasajero corrio á auxiliar al piloto, y como estuviese Reid gobernando el timon lo dego, y corrio sobre el pasajero y lo hecho á el agua;” que el declarante, “then asked them if they had wounded the captain, and they replied they did not know he had been wounded; they had no such intention, as the captain was a very good man.”

On the 10th of April, 1850, by order of the President of the Republic, transmitted through the governor of the province, the two men were placed at the disposal of Consul Baker, together with the boat and its accompaniments. The Germantown sailed with them for the United States, and on the 5th of June, 1850, they were brought into Norfolk by the United States steamer Vixen, Lieutenant Commanding Ward, to whom they had been transferred from the Germantown. After examination they, the two men, were sent to Richmond for trial in the United States Circuit Court.

*Wednesday, November 27th, 1850.*

*William T. Joynes, District Attorney, for the prosecution.*

*William P. Byrd, William A. Cocke, Joseph M. Carrington, for the prisoner Clements.*

The prosecution was under the act of Congress, 30th April, 1790, Art. 3168, Gordon's Digest, 929, 930.

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If any person commit upon the high seas, or in any river, haven, basin, or bay, out of the jurisdiction of any particular State, murder or robbery, or any other offence which, if committed within the body of a county, would, by the laws of the United States, be punished with death; or if any captain or mariner of any vessel shall piratically and feloniously run away with such vessel, or any goods or merchandise to the value of fifty dollars, or yield up such vessel voluntarily to a pirate; or if any seaman shall lay violent hands upon his commander, thereby to hinder and prevent his fighting in defence of his ship or goods committed to his trust, or shall make a revolt in the ship, every such offender shall be deemed, taken, and adjudged to be a pirate and felon, and being thereof convicted, shall suffer death; and the trial of crimes committed on the high seas or in any place out of the jurisdiction of any particular State, shall be in the district where the offender is apprehended, or into which he may be brought.

The indictment contained five counts, charging the prisoners jointly with the murder of John Heeney, on the 27th of January, 1850; the murder was charged as done "piratically, wilfully, feloniously, and of their malice aforethought," on the high seas, not within the jurisdiction of any State, or of any of the United States, but within the jurisdiction of this court.

1. The first count charged the murder as committed with a pistol, discharged by Reid, Clements present, aiding and abetting.

2. The second charged the murder as committed with a pistol discharged by Clements, Reid present, aiding and abetting.

3. The third charged the murder as committed with a dirk, held by Reid, Clements present, aiding and abetting.

4. The fourth charged the murder as committed with a knife held by Clements, Reid present, aiding and abetting.

5. The fifth charged the murder as committed by both, with instruments and weapons to the (grand) jurors unknown.

The indictment farther said, that the Eastern District (Fourth Circuit) of Virginia, is the district and circuit to which the accused were first brought.

The prisoners elected to be separately tried, and the case of Edward Clements being ready, his trial proceeded.

He appeared to be from twenty-five to thirty years old, had light-brown hair, high cheek-bones, light-gray eyes, and rather

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well-shaped features; his height was probably five feet nine inches.

He pleaded "not guilty" to the indictment. The arraignment was joint, and each prisoner pleaded the same plea.

*The Court* (James D. Halyburton, district Judge).—A question may arise as to the mode of obtaining the jury. I am of opinion that I might proceed according to the law now in force in this State, but as it has been heretofore held in full court that a prisoner is entitled to his peremptory challenges, and as I do not wish, sitting alone, to change the rule, I will allow the usual number of peremptory challenges, and then proceed to organize the jury according to the existing State law. This course will be most favorable to the accused.

The following were the jury :

Peter Crew, Robert P. Richardson, Leonard Slater, W. L. Mc-Minn, J. B. Dupuy, John A. Lancaster, William Boothwright, John D. Shell, Alex. Garrett, Charles Stebbins, Peyton G. Bayley, E. M. Porter.

For the United States :

*Solomon S. Riggs, sworn.*—I was captain of the schooner J. B. Lindsey during the past winter; the prisoner was on board as a sailor before the mast. On the 27th day of January, Sunday morning, we came out to sea from Port of Spain, Trinidad; we got out between 8 and 9 o'clock in the morning; things went on pretty well during the day; that afternoon a pistol was fired on deck; I was lying in my berth; I was alarmed and went on deck, and asked the mate what the pistol was fired for? He said he did not know, he would go forward and see. The mate, John Heeney, then went forward, and after awhile returned and said he would soon give me an account of it. I went to my cabin; in a short time the mate handed me two pocket-pistols; I took them and said: "They are more of men than I took them to be." My watch was out at 8 o'clock; Clements and Castello were in my watch; Reid was in the mate's watch, which was from 8 to 12. Before I left the deck I said to Clements: "Keep a good lookout, will you?" He spoke kindly and said: "Yes, sir." It was a fine moonlight night; I left the passenger, John Walker, at the wheel; the mate was also on deck; I went to the cabin

and turned into my berth. Between 10 and 11 o'clock I was awakened by a sound—it may have been a pistol-shot or a shrill scream. I jumped up, caught in my hands two small pocket-pistols, and ran upon deck; the cabin had two doors, each opening to the stern; the starboard door was shut; the larboard open. When I got on deck I saw persons on the starboard side running forward, half bent, between the cabin-house and the side of the schooner. I found the mate lying by the wheel, a stream of blood running from his body to the larboard; he was groaning and crying: "Lord! have mercy on me!" I tried to encourage him and to get him into the cabin; presently I heard some persons running aft on the larboard and starboard sides of the cabin-house; I don't know who was on the starboard, but the man on the larboard was Reid; I saw him, and saw the flash of his pistol as he fired at me; I felt myself hurt and staggered back, and fired my left-hand pistol, but missed him; I got into the cabin and sought to close the door; the cook was with me; I found my shirt bosom was all bloody; immediately afterwards three heavy blows were struck on the starboard door, and a voice, which I took to be Clements's cried: "Cook! come out and be murdered!" I think this was only to draw my attention, for instantly Reid again fired at me through the open door; I returned his fire, and when the smoke cleared I saw him lying on the deck; I think my ball struck him somewhere between the mouth and the eyes. I said to the cook: "I have got one down," and I think I said: "Now don't you look pretty, you old pirate," or something like that; I told the cook to look for my powder; I thought it was in my chest, which was opened, but presently I found it in my pocket, and loaded both my pistols; in the meantime the man lying on deck got up and went away; the cook took the two little pistols that had been handed to me by the mate, and loaded them. I put some brown paper on my throat and breast, and drank vinegar during the night; I bethought me of a small after-cabin, behind and lower than the chief cabin; I said to the cook we would get in there and defend ourselves; I slipped aside the slide, and got in and left the slide open one or two inches. We staid there until after day. Some one came on the top of the cabin-house; I went into the cabin and tried to shoot

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him through the stovepipe hole, but I could not get a chance, and could not see who it was. The cook and I remained in the cabin and after-cabin during Monday. In the afternoon I saw Clements in the fore-castle; I could see through the *run*, under the cabin-deck, and a plank was off the bulkhead of the fore-castle; about dusk, the cook was in the after-cabin; he cried out: "Captain! they are coming aft;" I heard one of his pistols snap, and then he fired another; we heard a noise in the hold; after awhile the cook came out and loaded his pistol, and we kept guard over the open (larboard) door. The next morning (Tuesday), at about daybreak, we saw some birds, "large land-birds," sitting on the taffrail; thinking from this that nobody could be near, the cook stepped out and shut the door, and we secured it with a lanyard. After this we heard a pistol fired in the hold, the ball from which, as I afterwards found, struck the forward bulkhead of the cabin. About 9 o'clock I looked through a crack in the forward folding door of the cabin, and saw Clements walking up and down from the mainmast forward with a horse pistol in each hand. He was too far for me to shoot him. I did not then see Reid, but after awhile I saw him on deck, with his face tied up in a handkerchief and a pistol in each hand. Presently I heard Clements cry out to me: "Give us the boat; if you don't give us the boat we will scuttle the vessel." I made no reply that I remember. In a short time the man Castello came aft with a cutlass in his hand to the starboard cabin-door, and said something; I did not hear what he said, I was so eager to shoot him; I raised up the binnacle door and levelled my pistol at him, close at his head; *the pistol snapped!* Castello left and went forward. The boat was hanging astern at the davits; Clements cried out: "What do you say, can we have the boat?" I said: "Take the boat if you will go off and leave us alone." He asked: "Won't you shoot us?" I said: "No, I will not shoot you," but nevertheless I intended to shoot them through the binnacle-holes when they came aft; I thought, under the circumstances, I was justifiable in doing this. As they came aft, I saw Reid with his face tied up and a pistol in each hand. Clements and Castello had no arms that I saw. One whom I did not see shut the binnacle-slides with the muzzle of a pistol, so I

could not see them ; I heard the boat fall into the water ; they carried her forward. Through the crack in the forward cabin-door I saw them take two coffee-pots and a tea-kettle and a pan from the *galley*, and I saw them cut the foot-rope of the square sail yard. I sat on my chest feeling very sad. I suspected that they would scuttle the vessel. I heard two blows struck, and thought they were scuttling her. I said to the cook, that if they scuttled her we would rush on deck and kill or be killed—that was our only hope. After this, all was quiet for a time ; I heard some one running aft ; it was Castello ; he seemed frightened ; he said : “ Captain, the boat is astern ! ” He pulled at the door ; I said : “ If you pull open that door, I will kill you, if my pistol will fire. ” He pushed aside one of the binnacle-slides and said : “ Captain, the boat is astern, if you don’t believe me, look out ! ” I ordered him forward ; he obeyed and then I opened the door and saw the boat about three hundred yards astern with Clements and Reid in it. I came out, and as Castello approached me I presented both my pistols at him, and said : “ Your life is in my hands. ” He said : “ Captain, I am innocent of this killing. ” (Stopped by prisoner’s counsel.) I asked if he had any arms. He said he had one pistol, which he gave to the cook, who fired it off to leeward. The boat seemed to be pursuing us ; we got up part of the mainsail and got under way ; the last I saw of them and the boat they were bearing off easterly. Our schooner was of 119 tons, and with only two men and myself disabled we had much difficulty, but we got safely into St. Thomas.

*By Joynes.*—Reid, the mate, and the passenger were on deck when I went below Sunday night ; I saw Walker at the wheel at 8 o’clock that night, and have never seen him since. I saw Clements in the forecastle Monday. The *cabin-house* is above the deck, and from its forward door you could see the whole deck forward. A pistol was fired Tuesday morning. Clements was walking backwards and forwards from the mainmast ; he had two horse-pistols (here two were produced), these are like them. The binnacle for the compass is abaft the cabin and has lights, so that when the hanging door inside is open the cabin is lighted from the binnacle. The aft larboard door had been hooked back, and remained open until Tuesday morning ; before it was

closed we had seen large birds sitting round on the taffrail, probably drawn by the body of the mate, which was becoming offensive. After the boat was nearly out of sight I had the body moved; it looked badly and was very offensive; I did not examine the wounds; I felt badly; it is probable the rudder ropes had chafed the legs, they had black marks upon them. I told Castello to sew him up in a hammock, and put a bag of sand to his head and feet. I read a prayer over him, and told them to commit him to the deep. I turned my back and did not see them. I never saw Castello during the affair until Tuesday morning. There were but two men in the boat; they were Clements and Reid. I got on deck about 10, and at 12 o'clock got an observation of the sun; I think my latitude was  $13^{\circ} 32'$ . When I left the deck Sunday night we were under mainsail, foresail, jib, and flying jib; when I came up the foresail was hanging, torn to pieces; I suppose the peak lashing gave way, and the throat lashing held on, and so, the gaff dropping, the sail swayed from side to side and was torn. The J. B. Lindsey hails from Norfolk, and is owned by Daniel E. Simonds, of Norfolk, William W. Simonds, of Elizabeth City, and Wallace Bray, of North Carolina.

*Cross-examined by Byrd.*—There were seven persons on board at 8 o'clock, Sunday night, Heeney, Walker, Reid, Clements, Castello, Smith the cook, and myself. When I was aroused and came on deck, I do not know how many persons were running forward on the starboard; I did not see Castello; the cook was in the cabin; I was in such circumstances of excitement that I could not tell how many persons were on the starboard.

*Cross-examined by George Blow.*—(Mr. Blow had been counsel in Norfolk and attended during part of the trial, but did not stay to argue the case before the jury.) I shipped Reid and Clements at Elizabeth City; I had found Castello aboard the J. B. Lindsey when I took her; she had just returned from Boston. Reid and Clements acted well in the cruise to Trinidad; I liked them and spoke highly of them. At Trinidad they went ashore, and two black men came alongside and said these men had sent them to work in their places. The day we sailed, a white boy, about eighteen years old, was brought aboard without my knowledge;

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I thought it wrong and had him sent off. Clements after that offered to pay his passage; he said he was an acquaintance of his, and he wanted him to go to the United States; Clements and Reid went ashore with this boy. We ballasted the 26th; I thought they looked and acted "a little suspicious" then; when the mate handed me the two pistols, Sunday afternoon, and I said "they were more of men than I thought," I little thought they had a chest almost full of arms; I don't say a chestful, but I think five pistols are *part* of a chestful at least. When I ran out I was in my drawers, bareheaded and barefooted, with a pistol in each hand; I was alarmed because of the noise, and because I heard a man crying, "Lord! have mercy on me." I can't tell anything of the distance between the wheel and the house; the cabin floor was three steps under deck, and the top was high enough for a man to stand upright with his hat on; the larboard door was fastened back by two nails, one in the door and the other in the house. No, sir, I did *not* fire my pistol first at the man, at the corner of the house; *he* fired first; I fell back upon the wheel; I did *not* strike my throat on the nail in the door; I do not know that the surgeon of the Germantown ever examined me; when the pistol was fired, I did not think I was shot by the ball; I thought it probable 'twas the powder; I have never felt the ball, but it may have clipped my neck. At 10 o'clock I suppose Reid ought to have been at the wheel; with the sail that I left on the schooner if the wheel had been left she would probably have run up into the wind's eye, and *shaken*; I did not hear anything of this sort while in my berth. When Castello came to the door with the cutlass in his hand, I did not trust him. We found a mashed ball in the cabin, which had passed through the lid of my chest; I have no doubt this was the *second* ball of the two that Reid fired at me.

*Re-examined by Joynes.*—I did not find any more pistols, but saw balls which were brought to me from the forecastle—they were large; the *mashed ball* we found had too much lead in it to have been a pocket-pistol ball. After I had shot Reid and he fell, Clements cried out: "Give us the boat." I told him he should not have her, I wanted to shoot another of them. I felt encouraged having Reid down. I bought these pistols in Trini-

dad ; I felt suspicious after the lad was found aboard, and I heard—(stopped.) I bought them because I felt suspicious. At Elizabeth City, Clements and Reid came aboard together, and Clements asked if I could give them a berth ; I told them I could give one ; he said one could not go without the other, so, as another man whom I had expected had not come, I shipped them both. The mate, when I found him wounded, made no statements as to who did it. The J. B. Lindsey sailed under the “Stars and Stripes.” We went into St. Thomas with colors at half-mast and Union down. Many persons boarded us, the American consul among them.

*Thursday, November 28th, 1850.*

*Thomas Castello, sworn.*—I was aboard the J. B. Lindsey. We sailed on the 27th of January, which was Sunday, from Five Islands, Port of Spain. In the afternoon, between two and four o'clock, while I was at the wheel, a pistol was fired forward. Captain Riggs was lying down in his berth ; he came on deck and said something to the mate ; the mate went forward ; I looked forward and saw Clements with a small pistol in his hand, and one of his fingers was bleeding. In a short time Clements came up and gave the mate two small pocket-pistols, and said : “ I am very much obliged to you.” Nothing else occurred till about eight ; Clements was at the wheel from six to eight. At eight the passenger, John Walker, took the wheel. I went forward, and Reid and Clements stood just about amidships ; they had a bottle and very politely asked me to take something to drink ; I took the bottle but did not drink anything. I went to the fore-castle and turned in to sleep. Some time during the night I was awakened, I suppose, by the noise of pistols ; I can't say what time of night it was. I got out of my berth and was going on deck, but found the fore-castle doors shut ; in this hot climate I generally slept with them open. I made some noise and tried to open them, but found them fastened. Presently Clements came to the fore-castle with a pistol in his hand, and said if I would stay below and make no noise I would not be hurt. I did not then see Reid, but he came afterwards and told me to keep up a

good heart, I should not be hurt; Clements came and talked the same way, and they kept running, first one and then the other, to the forecastle to see if I was there. I tried to get out by knocking a plank off the bulkhead of the forecastle, which had been started at sea, but finding I could not pass I lay down in my berth and took it coolly. Soon afterwards Reid came into the forecastle and said: "My God! I am shot;" Clements came directly afterwards, and stood on the steps; Reid said: "Go on deck and avenge my death, shoot somebody!" Then he said: "My pistol-ball, which I fired at the captain, was enough to knock down a horse, and yet his ball knocked me down." After awhile he said he did not believe he was as much hurt as he thought he was, and he got up, tied a handkerchief round his face, and went on deck. I then asked Clements what *this row* had all been about; he told me, after I came into the forecastle, Captain Riggs came on deck and told him to sway up the sails; he said he would do it about 12 o'clock; then Captain Riggs told the mate to knock him in the head with a handspike. Clements then asked me what I was willing to do; before I could answer Reid called Clements on deck; nothing further occurred until Monday morning; I continued in the forecastle until, about 8.30 or 9 o'clock, they told me I could come on deck. When I came up I saw the passenger, John Walker, lying in a pool of blood between the mainmast and the galley; I judged he was dead; Clements and Reid both had arms; each had a large pistol, and a cutlass was lying near; a small pistol was on one of them; Clements and I had quite a long conversation; I asked him who killed the passenger; he said—(here Byrd objected: We are not now on the alleged murder of Walker but of Heeney. The court said it was admissible evidence as part of the *res gestæ* and as illustrating the motive)—that Reid stabbed the passenger, and that he came very near getting Reid overboard and would have but for his assistance. I asked him where was the mate; he said he was abaft the house, dead! I asked who killed him; he said: "Reid stabbed him and I fired a pistol at him." Clements then told me that if I tried to go aft Captain Riggs would shoot me as quick as he would them. He then said that they wanted me to have nothing to do with the killing until they had killed the

captain, then I was to kill Smith, the cook. He asked me if I was willing to join them and not try to go aft. To save my own life I told them that I would; our conversation stopped there. Nothing remarkable occurred till about 1 o'clock, when Clements asked me to help to bring the passenger forward; I went and helped; he was *dead*; Clements cut both the pockets of his trowsers out; there was nothing in them but a piece of tobacco and a knife. Clements asked me to help to put him on the rail; I helped, and when the body was on the rail he took him by both feet and flung him overboard. In the afternoon they asked me what I thought they had best do; I told them I thought the best thing they could do would be to take the boat and leave the vessel. Clements was the man who talked most, Reid had very little to say at any time. Towards dark Clements told me he wanted me to go down and get the boat-sails out of the hold; we went down into the hold; a pistol was fired from aft; I was about abreast of the mainmast. We came on deck again. Afterwards Reid went down into the forecastle; Clements took a seat not far from me and said he was going to sleep; he handed me a large pistol; I sat on the end of the windlass about an hour; I judged Clements was asleep; Reid was in the forecastle; I put the muzzle of the pistol within a few inches of Clements's head and pulled the trigger; *the cap exploded, but the pistol did not fire!* Clements jumped up and asked me what I snapped at; I told him I thought I saw somebody aft. As soon as the cap went off, Reid came on deck; Clements took the pistol and went into the forecastle; I don't know what he did; when he came up he and Reid sat down together and told me to go to sleep, *but I did not!* Nothing more occurred until Tuesday morning. We heard a noise in the cabin as if Captain Riggs was nailing something; Clements said he would go ask him for the boat; he went down into the forecastle and called to the captain, but *we* did not hear any answer that we could understand, and Clements could not understand either. He came on deck, gave me a cutlass (the same I had seen before), and told me to go aft and ask the captain for the boat. I went aft and asked Captain Riggs to let me come into the cabin; he made no answer; I suppose he could have shot me, as my head was where he might have

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blown it all to pieces. I heard no pistol snapped. I went aft and told them the captain said they might have the boat. Clements and I went down into the hold and brought up the boat-sail and rigging. He then took the fore peak-halliards and made them fast to the painter of the boat, which was hanging at the davits; he came forward and we then all went aft, and Reid got upon the house and shoved to the binnacle-slides; Clements and I cut the boat adrift; I used a small pocket-knife which I had; while we were there, Clements picked up from the larboard side of the deck a knife all covered with blood and handed it to Reid, who took it; no remark was made about it. Yes, sir, it was like this one, I think it was the same. (The knife shown in court was a dangerous weapon, with a dirk blade, about six inches long, fixed in the handle.) As soon as we cut the boat adrift we went aft and hauled her forward; the boat was on the starboard side; the schooner would come up to the wind and touch and fall off again; she was in a manner hove to. Reid went below and handed up his and Clements's clothes, mine were not touched. Clements and I rolled the water-cask forward; they sent me into the galley to bring out coffee-pots, a tea-kettle, and any victuals that might be there; I went to the galley and brought out two coffee-pots, a tea-kettle, a pan, with hardly enough of provisions for one man for a day. They filled the coffee-pots and kettle with water; Clements went down into the fore-castle, and while he was there I heard a pistol fired, I suppose, by him. He soon came out; he said: "We will commence scuttling the vessel, that will entice the captain out, and we will shoot him;" I did not believe he would do it; he was all *talk and gas*. Previous to this I had taken the axe and hidden it behind the water-cask. Reid went into the boat, Clements and I passed in their clothes and all the other things. Clements stood behind me with a pistol in each hand; I got over the rail; Clements passed into the boat so far that he could not get back; I jumped back on board, seized the axe, and struck at the painter (boat-rope); the first blow I missed it—the second I cut it in two. I then fell down flat on the deck, so that if they fired they might not shoot me, because of the bulwarks. They had asked me if I wanted my clothes. After lying awhile I rose and saw the boat astern; I

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went down into the hold, and sung out to the captain that I had cut the boat adrift, and she was astern. I heard no answer; I then went aft, turned aside the body of the mate, eased off the main sheet, and put the wheel amidships; then went to the cabin and said to Captain Riggs that the boat was astern; the captain came with a pistol and told me to go forward or he would shoot me; I went forward, eased off the jib-sheets, hauled them aft, and hoisted all I could of the foresail. I then walked aft; Captain Riggs and Smith were on deck, each with a brace of pistols; the captain said: "I have a great mind to shoot you;" I told him I had nothing to do with the row, and stated to him what I have stated here to you. He asked if I had arms; I gave him a small pistol which Reid had given to me; the cook fired it off. Some time afterwards the captain told me to take the body of the mate forward and sew it up in a hammock; one arm was in the sleeve of a large overcoat, the other sleeve was off; the coat was bloody and smelled badly; I took it off and hove it overboard. The mate's body was so offensive that I could not examine it, but I saw clotted blood on the left breast and right side; it was swelled so much that I could not make a large navy hammock meet around it. The task made me so sick that I vomited. The sides of the vessel were covered with large birds, called "boobies" in the West Indies; I did the best I could; I put a bag of sand at the head and one at the feet; the captain read a prayer, and Smith and I committed the body to the deep.

*By Joynes.*—I next saw these men, Clements and Reid, in the City Hall, Norfolk. I never saw them have arms before, except a small pistol; it is very common, however, for seamen to have a small knife, a dirk-knife, and a small pistol. The white boy Captain Riggs has spoken of, was at the Crown and Anchor, Port of Spain, Trinidad. Reid and Clements staid there; the mate and I sometimes went there; the boy had sometimes shown us round; he said he wanted to go to the United States; mate told him perhaps, if he asked, the captain would let him go. Reid and Clements came off Thursday night with this boy. I did not tell the captain, because I know that most rows and bad-blood aboard ship are caused by tales carried backwards and forwards

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between the forecastle and the cabin. The mate asked me if the boy was aboard ; I told him to go and see. A black boy brought them off ; I did not see any clothes. At Trinidad Reid and Clements were a good deal ashore, and they had two negro men to work in their places. The J. B. Lindsey's house was about four and one-half feet high ; standing abaft I can see over the house ; it may be three feet or more from the house to the wheel. I don't know who was at the wheel from 8 to 12, but I know Walker was there at 8 ; if nothing had occurred, my watch would have been from 12 till 4, and the captain and Clements would have been with me ; I was in the forecastle from five to six minutes after 8 until Monday morning ; I am sure I did not go out ; when my pistol missed fire Monday night, if it had gone off it would certainly have blown Clements's brains out. It was within a few inches of his head.

*Cross-examined by Byrd.*—It was Clements who said they would scuttle the vessel and draw the captain out to shoot him. I had no right to believe or disbelieve whether they would scuttle her or not. I hid the axe with a view to cut the painter and cast them adrift ; when the captain came on deck, I think the boat was so far astern that a pistol-shot would have done no harm. They may have gotten ashore sooner than we ; we made almost as much leeway as progress. The mate and Clements were not on very good terms ; the mate told me he did not like Clements because he had too much talk ; he was generally called "Gassy Clements."

*Captain S. S. Riggs, recalled by Joynes.*—Aboard the J. B. Lindsey I had a little less than \$500, in dollars, and a Colonial bank bill for \$1154. This was known to the crew ; I had cut off a third of the bill and sent it to the United States by the schooner May Flower ; the crew did not know this.

*Daniel J. Smith, sworn.*—I was aboard the J. B. Lindsey the 27th of January, Sunday. I turned into my berth in the cabin at about 8 o'clock ; the first thing I heard was, I suppose, a shriek from the mate ; the captain ran on deck with his pistols ; as he went up I heard a pistol fire ; a short time afterwards I heard another, and the captain came running back and said he was wounded ; he said to me : "I wish you would get my pow-

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der ;" I went to look in the chest for it ; in a short time I heard a voice which I took to be Clements's and several knocks at the starboard door ; nearly at the same time I heard two reports of pistols ; the captain fired one and, I suppose, shot Reid ; I saw a man lying on deck whom I took to be Reid. After this, not much happened that I saw until Tuesday morning, when Clements called out to the captain to let them have the boat, and Tom Castello came aft with a cutlass in his hand ; and not long afterwards he called to us that they were astern, and we went on deck and saw the boat with Clements and Reid in it.

*By Joynes.*—On Monday night, I think, I fired at somebody about the mainmast in the hold ; my first pistol snapped, the second went off ; this was the only pistol I fired until we came up ; there was, I think, a pistol fired in the hold on Tuesday. I understood Clements to say to me, "Cook, come out and be murdered ;" the door on the larboard side remained open until Tuesday morning, when I shut it, and the captain and I made it fast with a lanyard ; the binnacle-slides were open, but we saw them closed Tuesday morning. When we came up, I saw the mate's body ; I did not examine it at all. I always slept in the cabin. In Trinidad I saw two small pistols in Clements's possession, which he offered to sell to the mate. I have seen such a knife as this (shown to him) ; it was lying on the deck with a couple of small pistols while we were in Trinidad ; nobody had them. At Trinidad I heard Clements say, "What did the captain say about my sending off men to work ?" I said, nothing. He said he had better not say anything, or he would wring his neck or his nose. In Trinidad I heard Clements say something to Castello about the freight, and heard something said about the money for the freight.

*Cross-examined by Byrd.*—I think the captain fired two or three times ; I can't say whether he fired as he ran on deck. I *was* a good deal frightened ; I crept into the after-cabin with the captain ; when we came up, the boat was about a hundred yards astern ; the boy who came aboard talked pretty good English.

*Castello, recalled.*—The boy was Irish ; I saw no private conversation between Clements and Reid and this boy ; I thought it was only for fun they had him aboard ; he was about 18 or 19

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Trial of Edward Clements.

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years old. I don't know that he was a sailor ; he attended at the bar of the Crown and Anchor.

The evidence for the prosecution closed.

For the defence, Thomas Reid was offered as a witness for the accused, who was jointly indicted with him.

*Joynes*.—He is incompetent.

Carrington, to sustain Reid's competency, cited Roscoe's Criminal Evidence, 141 ; 2 Starkie on Evidence, 16, 17 ; Hawkins P. C. iv.

*Joynes*.—The cases relied on are either where the accomplice was a witness *against* the accused, or where the parties were *separately* indicted ; I think no case can be found where the parties are *jointly* indicted, in which one (unless he has been *acquitted*) is competent for the other. 2 Virginia Cases, 344, *Campbell v. Commonwealth* ; 1 Hale's P. C. 903 ; *Commonwealth v. Marsh*, 10 ; Pickering, 57.

Byrd replied, citing 2 Leigh, *Brown v. Commonwealth* ; Russell on Crimes, 597 ; 2 Starkie, 21.

*The Court*.—If this were a new question, I should be inclined to admit the evidence. I confess I do not see much distinction *in principle* between cases of *several* indictments for the same offence and *joint* indictments. But the decisions are express that in the latter case the alleged accomplice is not competent for the defence unless he has been acquitted. I must exclude Reid's testimony.

The evidence closed.

*Joynes*, for the United States.—Roscoe, 580. Where a homicide is proved to have been committed, the law presumes it to be murder, and it devolves upon the accused, from the evidence adduced either for or against him, to show that it is either manslaughter or justifiable or excusable homicide. He argued that the facts of this tragedy proved a combination between Reid and Clements, and that even though Clements had not struck a blow or raised a hand to fire a pistol, yet if he was present, ready to help, aiding and abetting, he was guilty of murder.

*William A. Cocke*, for the defence.—The accused is not guilty of *piracy* according to its legal meaning, act of Congress, 1790, and according to the definition of piracy under the law of nations

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Trial of Thomas Reid.

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and the civil law. Story on Constitution, 405. He cannot be convicted of "making a revolt," because he is not so indicted. The act of Congress makes murder on the high seas piracy, but the evidence does not make out a case of murder; it is manslaughter only, at most, and that is a separate statutory offence, by act of Congress. See 3178, Gordon's Digest, 933. Not being indicted for manslaughter, he cannot be convicted at all.

J. M. Carrington, for the defence, addressed the jury for an hour, commenting upon the law and the evidence.

Byrd assailed the testimony of the captain and Castello; and argued that if the jury believed a part of Clements's statement they ought to believe it all, and if they believed that the mate struck him with a handspike there was ample provocation to make the killing manslaughter. He spoke two hours, not concluding until Friday, November 29th, 1851.

Joynes closed for the prosecution. He argued that there was nothing to prove that the mate struck the accused before the fatal blow was given; he vindicated the captain and Castello, and ended by an earnest appeal to the jury, 'fair alike to the accused and the United States.

The jury retired at about ten minutes past one, and in a quarter of an hour returned with a verdict of "Guilty."

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*United States Circuit Court, for the Fourth Circuit and Eastern District of Virginia.*

UNITED STATES v. THOMAS REID.\*

*Thursday, December 12th, 1850.*

THE prosecution and indictment were the same as in the trial of Edward Clements, *ante* pages 509, 527.

The accused appeared to be from thirty to thirty-five years old, and about five feet, eight inches high; he had dark hair and eye-

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\* From Howison's Trials, published in 1851.

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Trial of Thomas Reid.

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brows, and a dark complexion ; a slight scar was visible on his face, near the nose and eyes ; his expression was not forbidding, though firm.

He pleaded "not guilty" to the indictment, as before stated.

The following were the jury :

James H. Gardner, William M. Sutton, William Slater, Hiram Bragg, Ira Tichenor, Edward D. Eacho, Charles G. Thompson, R. M. Allen, Thomas W. Keesee, James Phillips, Franklin Stearns, Hugh Rileigh.

*William T. Joynes, for the United States.*

*R. G. Scott, T. P. August, A. Judson Crane, for the prisoner.*

Upon request of the prisoner's counsel, the prisoner's affidavit was taken to certain statements, upon which the court directed a writ of *habeas corpus ad testificandum* to issue to the jailor of Henrico County jail to bring up three persons confined there, viz., Franklin Allison, Joseph J. Hall, and Edward Curtis.

*Friday, December 13th, 1851.*

*Solomon S. Riggs, sworn.*—I had some suspicions of these men in the port of Spain. I arrived there the 17th of January, sold my cargo, went aboard the vessel, got my papers and got my cargo entered at the custom-house, engaged a large lighter called a "go-bar," and nearly loaded her ; on the 18th we went on discharging. In the evening, after supper, Clements and Reid asked me for permission to go ashore ; I gave it, but told them to be back by gun-fire. They were not aboard the next morning ; I remarked I expected Reid and Clements were in the "calaboose." While we were working, two black men came alongside and said they had sent them to work in their places. After awhile I went ashore ; at the landing Reid and Clements met me ; Clements asked me how the men they had sent worked ; I said : "Quite well ;" Clements asked me if I would go up and take a glass of porter ; in the afternoon they went aboard before I did ; when I came aboard, the cook said to me he was afraid

## Trial of Thomas Reid.

I would have trouble (stopped by Mr. Scott). On the 25th we went to Five Islands, and ballasted before sundown the 26th. In the course of the day Clements kept up a "monstrous hallooing and to do;" I thought it didn't look right; I told the mate we would go to sea early the next morning. As I was sitting aft, inclining my head near the (dacey?) I saw Reid, who seemed to be filing something; he was sitting forward on the windlass; every now and then he seemed to be peeping round the foremast at me; I did not see what he was doing, but heard the sound. These things made me a little wakeful; I did not sleep much that night.

*Joynes.*—Captain Riggs, where and by whom was the vessel owned?

*August.*—We insist that Captain Riggs cannot be permitted to prove these matters by his verbal statement; the best evidence of ownership is the register, and it ought to be produced.

*Scott.*—I remember that this question was before Chief Justice Marshall in a case in which I had the honor to be counsel. It was in the trial of a Chilian, accused of murder aboard a vessel which, I think, was alleged to be owned in New Bedford. The prosecution sought to prove that this vessel was owned by American citizens in New Bedford; the Chief Justice said the ownership must be proved, and that as the acts of Congress required registry, that was the best evidence, and none secondary could be introduced. Roscoe, i; Gilbert's Ev.; Buller's Nisi Prius. I take the principle to be this, that the law has fixed what shall be evidence of title to the vessel, and this is required to be written and matter of record in the custom-house. If the J. B. Lindsey had papers, they ought to be produced; if she had none, then when she passed upon the high seas she was not an American vessel or not entitled to peculiar protection as such.

Joynes was about to reply.

*The Court* (stopping him).—This point has been frequently raised before me, and, I believe, always in criminal cases. Suppose no registry acts had ever passed and a murder had been committed on the high seas aboard an American vessel, would it not have been punishable according to the laws of the United States? I think it would. Then, as to the registry acts; they were intended

to encourage and protect our commerce; but I think that an American vessel not registered is still a vessel of the United States, and that crimes committed on board of her would be punishable according to the acts of Congress. But admit that she was registered, is there anything in the acts of Congress or the general rules of law making the register the highest evidence of ownership? The registry is merely the oath of a party that the vessel is owned by certain persons, reduced to writing and recorded in the custom-house. It does not seem to me to be higher evidence than the oath in open court of a witness who knows the ownership. The objection is overruled.

*Witness.*—She was the property of (as before stated). I think she was built in North Carolina.

*Cross-examined by Scott.*—I cleared for Martinique; I think I went thither and then to Trinidad for a market; I had no money going out, except five or six dollars. In the voyage out I did not observe that Reid and Clements had any arms; they behaved and worked well. They paid the black men for working; I did not. When Clements hallooed so much Saturday, it surprised me, because he had not done it before, but it is not unusual for seamen in hoisting to halloo; he made a great noise. In Trinidad I received about \$500 in specie, and brought it aboard in a little bag; this was late Friday evening. Clements and Reid were in the boat with me when I brought it off. The pistols handed to me by the mate I afterwards gave to another mate who shipped with me at St. Thomas; I gave them to him in Ocracock Inlet. I delivered my own pistols to the United States commissioner at Norfolk. There were eight berths in the cabin; the cook and I both lay in berths, he on the larboard, and I on the starboard side, but I don't know that any one outside could have seen either of us. When I ran out the mate was lying on the starboard side, his head towards the rudder, his feet under the wheel-ropes; I was on the larboard side, with my head resting on a spoke of the wheel, when I heard them running back aft. I made no remark; I did not say, "Who is there?" had not time; I fired after Reid fired; yes, sir, I was alarmed; I got into the cabin as fast as possible. The second time he fired, he came round the corner of the house; his ball, as I afterwards found,

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Trial of Thomas Reid.

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struck the facing of the door and passed through the lid of my chest; I was right in front of a *stand* which comes out eighteen inches from the bulkhead. I fired back and he fell, with his feet near a ring-bolt in the deck.

*Thomas Castello, sworn.*—Reid said nothing when we were throwing the body of the passenger overboard; it took place about 1 o'clock Monday:

*Cross-examined by Scott.*—The city of Norfolk is my present residence. I shipped the 19th of November, 1849, at Boston, with the mate, John Heeney, aboard the J. B. Lindsey, Captain Hathaway. I have been a seaman twelve or thirteen years; when Captain Riggs sailed, we went first to San Dominique, then to Martinique, then to Tobago, then to Trinidad; there was a difficulty at Trinidad between the captain, Clements, and the cook, Smith; Reid and I were neutral; I can't say as to the day of the month; I did not keep the log-book. I introduced the passenger, John Walker, to the captain; I have seen Reid, Clements, and the passenger all pretty drunk together; when I saw them once, the passenger was beastly drunk and under the table, and Reid and Clements were fighting. The passenger said he was an Englishman and wanted to come to the United States. I must now mention what I omitted to state on my former examination. In Trinidad Clements asked me how much money there was aboard; I said five hundred dollars; he told me I was a damned liar, there was at least eighteen or nineteen hundred dollars.

*Scott.*—Why did you not state this before?

*Witness.*—Because I forgot it—it did not come to my mind.

(Here a sharp colloquy took place between Mr. Scott and the witness.)

I have *never* said since Clements's conviction that I came here to convict him, and was glad he was convicted. I deny it entirely. I never said it or anything like it, and I challenge anybody to show it.

*By Joynes.*—Clements's question about the money was on Monday; Reid, Clements, and I were then all standing together.

*Saturday, December 14th, 1850.*

*Daniel J. Smith, sworn.*—In Trinidad I heard Clements talk about the money ; I never heard Reid say anything particularly one way or another ; I heard Clements say to Reid, “ I should like to take the vessel and get the money ; ” Reid made no reply. Clements said it would be a pretty good raise if they could get through with it ; in the same conversation he said it would be all right if they could get me ; they would put Tom Castello to death and I must kill the captain. I never heard Reid say anything more than “ umph, umph.” One evening I went ashore ; Castello set me ashore in a boat ; Clements and Reid asked us if we would take something to drink ; Castello said a little beer would do. They wanted me to go up to a woman’s, named “ Yankee Lize ; ” after we got up there, they asked me if I would drink a little sweet wine ; I said I didn’t care, sweet wine would do as well as anything else. They sent out for a bottle ; Clements was mixing a dose ; I thought he might be going to poison—(stopped). After awhile they introduced me to “ Yankee Lize,” and I went with her ; they went away.

*Cross-examined by Scott.*—I shipped aboard the J. B. Lindsey at Elizabeth City. ’Twas in January, I think. I shipped one day and was off the next. I am from South Carolina. We had been three or four days at Trinidad before I heard Clements say anything about the money. Some of our cargo was out. I don’t guess they thought I heard them ; I was standing near and heard. I did *not* state at the former trial that I heard Clements say all this about the money and taking the vessel, because I was stopped ; I was commenced in the middle and stopped in the middle.

*Scott.*—Who stopped you ?

*Witness.*—All hands and the cook.

*Scott.*—Who ?

*Witness.*—I don’t know who stopped me ; I knew all this then and would have stated it, but I was stopped. Captain Riggs and I have had strife, but it is all over, and I suppose nothing is to be said about it now. The captain *did* once try to shoot me, but I

## Trial of Thomas Reid.

suppose he was out of his head ; he snapped one of his pistols at me the Friday after the Tuesday we came on deck ; I think he must have been out of his head ; at St. Thomas, the captain put me in irons, but I was taken aboard when we left and did my duty to Elizabeth City.

*By Joynes.*—He put me in irons because I got somewhat intoxicated ; I don't know any other reason. When he snapped the pistol at me I think he was certainly out of his mind ; he had been asleep not long before ; I got up out of my berth and was going out when he roused up and snapped a pistol at me.

*By a Juror.*—He said nothing, not a word was said. He gave me the pistols immediately afterwards, and told me to put them into his chest ; I put them and a knife he had into his chest, and locked them up and kept the key. The captain was very unwell ; he suffered a good deal from his wound ; he did very little duty before we got into St. Thomas.

*By the Court.*—I never saw any symptoms of derangement in him before.

*Castello, recalled.*—I do not know whether the captain snapped the pistol at Smith or myself or a tarpaulin. The man was not rational, sir. This was on Saturday, the 2d February. He had been suffering much from his wound ; I think he was not rational from his manners, his action, his eyes, everything about him. He was often in a high state of fever. He did little or nothing in navigating the vessel ; he tried to take an observation from the sun, and he made the latitude  $17^{\circ} 12'$  when we were certainly in  $17^{\circ} 38'$ . Sunday night Smith and I were obliged to take the vessel from him. We got in on the 4th of February ; the captain was taken ashore by a physician.

The evidence for the prosecution closed.

For the defence :

*John R. Tucker, Lieutenant United States Navy, sworn.*—I know Reid, the prisoner ; he sailed with me about twenty-eight months in a voyage to the East Indies in the United States ship St. Louis. His character was very good ; he was very quiet, industrious and attentive to his duties. From all my opportunities of knowing him, I believe he had a kind and tractable disposition. We left

## Trial of Thomas Reid.

the United States in 1843, and got back in 1845. I think he was stationed in the foretop during the whole voyage. I do not think he knew anything of navigation ; I should probably have found it out if he had known anything of it. His character and conduct must have been more than ordinarily good from the fact that in so long a cruise I heard no complaint of him.

*Charles F. McIntosh, Lieutenant United States Navy, sworn.*—I know Reid well ; he was in the United States frigate Saratoga with me some twelve or fifteen months in 1847 and 1848. It was in the Gulf of Mexico ; I believe his character was very good ; he was a very quiet, good man, and I think a great favorite with the crew. He talked very little ; I may say that Reid, like all other seamen, would sometimes go ashore and get drunk, and then he was a very reckless man, but when sober he was remarkably quiet and peaceable ; he had no knowledge of navigation, I think.

*Franklin Allison, sworn.*—I have had some conversation with Castello in the jail. The day Clements came last from court I saw Castello and Smith ; I asked Castello what was the result ; he said Clements was convicted and it was what he (Castello) went for, and that if his evidence would convict Reid he would do it.

*Cross-examined by Joynes.*—Clements was upstairs ; I was downstairs ; I have the privilege of going up and down stairs ; I have been confined about twelve months ; I am charged with horse-stealing, have never been tried ; never had any conversation with Clements about this trial ; I spoke to both Smith and Castello, but don't know whether Smith heard ; I think I mentioned this talk to Reid ; I think some of the other persons heard me talking ; I never mentioned it to Mr. Winston, the jailor, and never afterwards talked to Castello. This conversation was at the lower window ; I don't know whether any person was at the window above. I mentioned this to Reid the same evening ; I did not like to talk to Clements because he seemed low-spirited.

*Joseph Hall, sworn.*—I knew Castello in St. Thomas ; he was a seamen aboard the J. B. Lindsey ; I went aboard the third day after his arrival and conversed with him ; I remember he showed me the place on the rail where he cut the painter ; he said he struck two blows. I heard some talk in the jail between

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Trial of Thomas Reid.

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Allison and Castello at the window ; I understood Allison to ask him how Clements came out at his trial. Castello answered : " I have convicted Clements, and intend to do the same for Reid if my oath will do it."

*Cross-examined.*—Curtis and I were standing at the stove ; 'twas not in a room, 'twas in a passage ; the stove was three or four feet from the window ; I saw Castello's face, but saw nobody with him. I told Clements and Reid about this conversation the same evening ; I said nothing to others, because Reid asked me not to, as he wished to have me as a witness. *Joynes.*—Why are you in prison ? *Witness.*—*For refusing to work without food.* Four others were convicted at the same time. I was in no vessel in St. Thomas. I had been shipwrecked and was in charge of the United States Consul ; I came to the United States in the schooner Joseph Barker.

*Edward Curtis, sworn.*—I have heard Castello speak of Clements ; two weeks ago last Friday, Allison, Hall and I were in the passage by the stove ; Castello passed by the window ; Allison asked him how Clements's case had gone ; Castello said he had convicted Clements, and would do the same for Reid if his oath would do it.

*Cross-examined.*—I did not see anybody with Castello ; I *sluiced* round and went upstairs ; Allison and Hall did not follow me immediately ; I went up and told Clements, and he said he hoped I would remember the words ; I never mentioned it to Reid or anybody else. I have been in jail about a month *for refusing to eat salt beef.* I don't exactly know what the charge was ; five of us were convicted at the same time.

At this point Mr. Joynes, at the suggestion of the court, and in justice alike to the witnesses Hall and Curtis and the United States, stated that they had been convicted at Norfolk, under the act of Congress, for "conspiring and encouraging each other to disobey orders."

The evidence closed.

Mr. Joynes, for the prosecution, addressed the jury from a quarter to 2 until 3 o'clock.

Mr. Crane, for the prisoner, spoke from 4.15 to 5.30 o'clock, P.M.

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Trial of Thomas Reid.

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Mr. August, for the prisoner, spoke on Monday, December 16th, from 10.30 A.M. until 12.15 P.M.

Mr. Scott, from 12.15 until 2.10.

Mr. Joynes closed at about 5 o'clock.

The jury retired, were kept together during the night, and returned into court on Tuesday, December 17th, 1850, at 2.30 o'clock, with a verdict of "guilty."

*Thursday, December 19th, 1850.*

A motion for a new trial in Clements's case was made and argued at length. The grounds assigned were :

1. That Reid's testimony ought to have been admitted.
2. That evidence had been admitted of the murder of Walker, another and a distinct offence, and the subject of a distinct indictment.
3. That the jury ought to have been charged as to manslaughter as well as murder; the prisoner's counsel, Byrd and Carrington, insisting that under this indictment he might have been convicted of manslaughter.
4. That new and material evidence had come to light since the trial (referring to the evidence of Allison, Hall, and Curtis).

*Friday, December 20th.*

The court overruled the motion for a new trial.

*Saturday, December 23d.*

The prisoners were brought up for sentence. On being asked if they had anything to urge, Edward Clements said, in substance, that he had no hope that what he said would prevent the sentence, but he wished to make a statement: "At 8 o'clock my watch was out; I left Heeney and Walker on deck; Castello had gone to the forecastle; as my custom was, I took my blanket aft and laid down on deck to sleep; I was awakened by the mate, who punched me in the side with a handspike, and told me to get up and sway up the foresail; I told the mate it was not my watch, that there were two of them, and that in my watch I would do what it was my duty to do; John Walker said, if he

## Trial of Thomas Reid.

had command of the watch, and if he were the mate, he would knock my brains out; the mate then said: 'Get up or I'll knock your brains out,' and struck me on the arm. I said I would report to the captain; a struggle took place, and I stabbed him with my sheath-knife, and he fell at my feet; the passenger interfered, and Reid killed him."

The court sentenced them, and appointed the last Friday in January as the day of their execution.

*Thursday, January 16th, 1851.*

A motion for a new trial in Reid's case was made by his counsel on two grounds:

1. That after the jury were sworn, and before they rendered their verdict, a copy of the *Dispatch* newspaper which contained a statement of the evidence, was read by several jurors without the consent or knowledge of the court or counsel.

2. That Reid ought to have been admitted as a witness for Clements and Clements for Reid, under sec. 21, chap. 199, Code of Virginia, 752, which reads thus: "No person who is not jointly tried with the defendant shall be incompetent to testify in any prosecution by reason of interest in the subject-matter thereof." This statute seems to have escaped the attention of the counsel for both prisoners until both trials were over. They now contended that it gave the rule in the United States courts.

*Joynes.*—I shall insist that the jurors are not to be heard to prove any facts by which *their own* verdict is sought to be assailed.

This question was fully argued, the counsel for the prisoner relying chiefly on *McCaul's Case*, 1 Virginia Cases, 306; *Kennedy's Case*, 2 Virginia Cases, 510.

*Friday, January 17th.*

*The Court.*—It is undoubtedly true that the courts have not admitted without great reluctance and caution the affidavits of jurors, in order to attack their own verdict. In civil cases, involving only pecuniary interests, the public inconvenience which would result from hearing such affidavits is sufficient to exclude them, but in criminal, and especially capital cases, I think the

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Trial of Thomas Reid.

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favor of the law to life and liberty is more than the argument from inconvenience. I shall therefore hear the affidavits of the jurors.

Several jurors were sworn and testified. Among them,

*Charles G. Thompson, sworn.*—I saw a paper in the hands of some of the jury; I don't know what paper it was; it contained a statement of the evidence in Reid's case. I probably read a quarter of a column.

*By Joynes.*—I think what I read was a statement of the captain's testimony; I was not at all influenced by what I read; I do not think that report was entirely accurate; I think we had heard the evidence but not the argument; I believe I read the paper before the court was opened in the morning.

*Hugh Rileigh, sworn.*—I read a copy of the *Dispatch* containing a statement of the evidence in Reid's case. I read some part of it here and some part in the jury-room. I had the paper in my pocket; I do not know that it was read by any other juror; I think it was once spoken of; the report I thought accurate, but I did not read it particularly.

*By Joynes.*—I got the paper at my store; I am a subscriber for it, and pay by the week. I was not at all influenced by what I saw in the paper. *By the Court.*—I sometimes referred to it for the purpose of refreshing my memory, but if I found there any statement which I did not recollect at the trial, it had no influence on me; I read more from curiosity than otherwise. My impressions were not altered as to the question of "guilty" or "not guilty" from first to last.

The motion for a new trial was elaborately argued for the prisoner by Scott and Crane, and for the United States by Joynes.

*The Court.*—As these cases and the questions that have been raised are of great importance, I shall not now decide the motion, but shall adjourn it to the next term, when it is probable the Chief Justice may be sitting here. In the meantime I shall set aside the judgments.

HON. ROGER B. TANEY, *Chief Justice of the United States, and*

HON. JAMES D. HALYBURTON, *District Judge, sitting.*

*Friday, May 14th, 1851.*

The motion for a new trial in Reid's case came up for reargument.

*Joynes.*—I shall again insist that the jurors ought not to be heard at all against their own verdict, but for convenience and for the purpose of saving time this question may be argued with the others that arise.

*Taney, C. J.*—If it will not disturb too much the course of argument for which the prisoner's counsel have prepared themselves, the court would prefer that this question as to the admissibility of the jurors' statements shall be argued *first* in order.

*Crane.*—1. As to the admission of the jurors' affidavits: Bacon's Abridgment, 5 vol. 369; 1 Croke Eliz., *Metcalf v. Dean*, 189; *Commonwealth v. McCaul*, 1 Virginia Cases, 306; *Overton's Case*, 1 Robinson, 756; 5 Pickering, 296; 13 Massachusetts Reports, 217.

2. As to the competency of Reid for Clements and of Clements for Reid, I cite first our statute, Code of Virginia, 1849, 752. The construction of this seems plain, and I suppose, if this prosecution were in the State court, the question would be promptly decided. Does this act give the rule of evidence in the United States courts? I insist that it does. 34 sec. Judiciary Law, 1789; Gordon's Digest, sec. 534, page 125. The laws of the several States are rules of decision in trials at common law. Burr's Trial, 481, contra; 10 Wheaton, 1; 9 Cranch, 98; 11 Peters, 175; 12 Peters, 84; Hamilton's Argument in the Judiciary in *The Federalist*.

3. As to the effect of the jurors' evidence in vitiating the verdict: Wheaton's Criminal Law, 644-5; Bacon's Abridgment, 5, 369, edit. 1844; 2 Hale's P. C. 296; United States Digest, 1849, 2, 695; Supp. United States Digest, 5, 435; *Overton's Case*, 1 Robinson, 756; 12 Pickering, 496; 1 Pickering, 337;

Massachusetts Reports, 13, 217; *Commonwealth v. McCaul*, 1 Virginia Cases, 306.

*Joynes*.—1. The affidavits of jurors ought not to be admitted to prove their own misbehavior. This is the settled English rule, commencing with *Varse v. Dilaval*, 1 T. Rep. 11; 1 Chitty's Crim. Law, 655; Graham on New Trials, 111; *Straker v. Graham*, 4 M. & W. 721; *Burgess v. Langley*, 4 M. & Gr. 722. The same rule prevails generally in the United States. Wharton's Crim. Law, 655. It is the rule in criminal as well as civil cases. *Rex v. Woolley*, 6 M. & S. 366; *State v. Freeman*, 5 Conn. Rep. 348; *Commonwealth v. Drew*, 4 Mass. Rep. 398; *State v. Dry*, 1 Murphy, 94; *State v. McLeod*, 1 N. C. Rep. 344. In Tennessee, such affidavits were held admissible in criminal cases in *State v. Crawford*, 2 Yeager, but the practice has since been regretted and characterized as dangerous, and a disposition expressed to restrict it. *Norris v. State*, 3 Hump. 333. Commented on, *McCaul's Case*, *Kennedy's Case*, and *Overton's Case*. In all of them, affidavits of the jurors were either accompanied by other evidence or designed for their *exculpation*. See *Cochran v. Street*, 1 Washington, 103; *Moffat v. Bowman*, 6 Grat. 219; *Price v. Warren*, 1 H. & M.; *Shobe v. Bell*, 1 Rand. 392; *Hadwell v. Burnett*, *Ib.* 282; *Hansberger v. Kinney*, 6 Grat. 287.

2. As to the competency of the accused for each other. Sec. 21, page 752, Code of Virginia, gives no rule in this court. 10 Wheat. 49; *United States v. Marchant*, 12 Wheat. 480; *United States v. Shive*, Bald. 511; *United States v. Wilson*, Bald. 82; *Western Insurgents*, 2 Dallas; 2 Burr's Trial, 481; Chase's Trial, 165, Appen. 34. The 34th sec. Gordon, 334, adopts only rules of property, 16 Peters, 1. See *McNeil v. Holbrook*, 12 Peters, 84. If it adopts rules of *evidence* in criminal cases, then there will be no uniformity, and a man accused of *piracy* would be acquitted in one State and convicted in another. But if sec. 21, p. 752, Code of Virginia, gives the rule here, still I insist it has not altered the common law, which excludes accomplices for each other. This section only applies to witnesses *in support* of the prosecution. I. R. C. 581, 582; Acts '1847-48, p. 124, Rep. Rev'rs, 987. The construction of this act insisted on for the prisoner, would deprive this court of its discretionary power as to granting separate

## Trial of Thomas Reid.

trials to parties jointly indicted. See *United States v. Marchant*, 12 Wheat. 480.

3. As to the facts said to be proved by the jurors. They are no ground of new trial. *Thomas's Case*, 2 Virginia Cases; *McCarter's Case*, 11 Leigh, 633; 12 Picker. 496; 1 Hill, 207; 6 Leigh, 1; 2 Summ. 83; Trial per pais, 218, 223, 225, 229; Graham, 47; *Rex v. Wolfe*, 1 Chitty, 701.

Scott replied, commenting upon the authorities cited by Joynes, and citing Graham on N. T. 109, 161; 5 Pickering; *Grayson's Case*, 6 Grattan. If the State law does not give the *rule of evidence*, a negro would be competent in the Southern States to testify against a white man in the United States courts!

The court heard the statements of such of the jurors as were *willing* to make them, as to the reading of the *Dispatch* and its effect upon their minds.

*Monday, May 19th.*

TANEY, C. J.—Judge Halyburton and myself differ as to two points arising upon this motion. 1. He thinks Reid's testimony admissible upon a proper construction and application of sec. 21, ch. 199, Code of Virginia. I should concur with him if I regarded this a mere question of evidence, but I think it goes deeper, and affects the discretionary power of this court as to granting *several* trials upon joint indictments. This rests in the sound discretion of the United States courts, but if this act of Virginia applies as contended for, the prisoner would have a *right* to insist upon separate trials. I think, therefore, the act does not apply.

2. Judge Halyburton also thinks a new trial ought to be granted on the statements of the jurors. I do not think affidavits of jurors ought to be received to impeach their own verdict, but even if received the statements of the jurors in this case seem to me no ground for a new trial. Upon a certificate of this division of opinion between Judge Halyburton and myself, the questions in these cases will go to the Supreme Court of the United States for decision.

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Statement of the case.

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*United States Circuit Court for the Eastern District of Virginia,  
at Norfolk, 1879.*

## JOHN E. WOOD v. STEAMTUG LUMBERMAN.

Where a purchaser of a vessel, who takes pains before purchasing to ascertain the claims against her and to see them settled, is informed by a claimant (who is afterwards the libellant) that he has but one small claim, which is afterwards paid, and this claimant fails to inform him of the existence of a negotiable note given in payment of another claim which is receipted, and which the vendor shows as receipted to the purchaser,  
*Held*, That this negotiable note is not a lien upon the vessel.

## IN admiralty.

In this case John E. Wood libels the tug for the amount of \$104.24, the price of coal furnished the tug while it was owned by C. H. Hostetter. The tug was soon afterwards purchased by Brillinger, the present claimant and owner. The law of Virginia gives a lien to materialmen upon domestic vessels.

Wood, through his agent, had given a receipt for the amount of his bill for coal, in which no mention was made of a promissory note taken by Wood in payment of the bill. Brillinger saw this receipt, but heard nothing of the note, before he paid for the tug.

Further facts in the case were the following: Before Brillinger purchased the steamer of C. H. Hostetter he required the latter to settle all bills against her, so that there should be no claim made after he should become the owner. This Hostetter did, with the exception of a few small bills which Brillinger was willing to assume, or trust to be paid. Among other bills produced to Brillinger by Hostetter as having been paid, was that of the libellant, filed with Brillinger's answer, and now attached to this paper. If Brillinger had suspected that the bill had not been actually paid, he would have deducted it from the purchase-money, as he did in the case of some small bills he assumed. He also made inquiries, so far as he could, as to outstanding bills against the steamer before he would run the risk of a final settle-

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Opinion of the court.

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ment. He went with H. H. Hostetter, brother of C. H. Hostetter, who was in the employment of the latter, to see libellant. Did not see him, but saw libellant's brother, who seemed to have charge of the business. On inquiry, he said he had nothing against the steamer but a small bill for coal, but that they had a note against C. H. Hostetter which would soon be due, and he hoped he, H. H. Hostetter, would provide for it. This small bill was soon after paid by H. H. Hostetter. This was just after C. H. Hostetter had left the State and his disappearance had been talked of. After Brillinger had purchased and paid for the steamer he got coal from libellant and paid bill when presented, but nothing was said to him about the steamer owing anything for which C. H. Hostetter had contracted, except the small bill paid afterwards by H. H. Hostetter, as mentioned.

H. H. Hostetter confirmed the testimony of Brillinger as to the statement of libellant's clerk or superintendent at the yard, and the payment of the small bill by him as mentioned.

Captain Brown said he remained in charge of steamer after Hostetter sold to Brillinger. That once after Hostetter had left, when he was taking in some coal, he spoke to the younger Wood about Hostetter having gone off leaving debts, etc., and that Wood said Hostetter left in debt to them, but that he did not owe them anything they could make out of the boat.

HUGHES, J.—I think on the facts of this case (the libellant having given a receipt for his claim, in which he made no mention of his note, and by which Brillinger, who saw it, was thrown off of his guard, and Wood's brother or clerk having declared to Brillinger that the house had no claim on the tug), that the lien was waived and the purchaser took the vessel clear of the lien.

The decree given under this decision was affirmed on appeal by Bond, Circuit Judge.

*L. D. Starke, for the libellant.*

*W. H. C. Ellis, for the respondent.*

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Opinion of the court.

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*United States Circuit Court, Eastern District of Virginia, at  
Alexandria, January 10th, 1878.*

UNITED STATES v. M. McCracken.

Under section 3995 of the Revised Statutes of the United States,  
*Held*, That no offence is committed unless the mail is *in transitu*, and unless the horse or vehicle taken is employed *in carrying* the mail.

ON an indictment for obstructing the United States mail.

There were two indictments in this case, one of them charging that the defendant obstructed and retarded the passage of the mail by the detention of a horse, and the other for doing the same by the detention of a horse and carriage or sulky.

The proof was that the mail-carrier took the mail to the defendant's livery stable in Fredericksburg, and was about to take out a horse which he was in the habit of using for carrying the mail to Orange Court-house, when the horse was held by the defendant for money due for keeping the horse. This was the gist of the testimony submitted to the jury.

After the evidence was all in the judge asked if the district attorney thought it worth while to go on with the case, intimating that the evidence did not bring the act of the defendant within the terms of section 3995 of the Revised Statutes of the United States, under which the prosecution was instituted.

HUGHES, J.—The law declares that no one shall obstruct or wilfully retard the *passage* of the mail, or any carriage, or horse, or carrier, *carrying* the same.

It contemplates an obstruction while the mail *is passing* from one place to another, and the obstruction of a carriage and horse while engaged *in carrying* the mail, the mail being *in transitu*.

The indictments under trial are for the offence just described, of obstructing and retarding a horse and vehicle in and while actually carrying the mail.

Now this is a very different offence from that of preventing a horse from being taken out of a stable to be used for the pur-

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pose of carrying the mail. This particular section of the law does not contemplate such an act, and therefore it is useless to go on with the case. I would have to set aside the verdict if the jury should render one of guilty.

The prosecution submitted to a verdict of not guilty.

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THE foregoing case differed from that in 3 Hall's Law Journal, 128 (*United States v. Barney*, below), where the stage-horses upon which an innkeeper had a lien were stopped in the public highway while drawing a stage-coach containing the mail.

*United States District Court, Maryland District.*

## UNITED STATES v. BARNEY.

1. The United States government cannot be sued.
2. The lien of a private citizen against horses for their livery cannot be enforced in a manner to stop the passage of the United States mail in a stage-coach drawn by the horses.

WINCHESTER, J.—The indictment in this case, which charges the defendant with having wilfully obstructed the passage of the public mail at *Susquehanna River*, is founded on the act of Congress of *March*, 1799.

The defendant sets up as a defence and justification of this obstruction of the mail, that he had fed the horses employed in carrying the mail for a considerable time, and that a sum of money was due to him for food furnished at and before the time of their arrest and detention.

On this state of facts two questions have been agitated.

1st. Whether the right of an innkeeper to detain a horse for his food extends to horses owned by individuals and employed in the transportation of the public mail? And,

2d. Whether such right extends to horses belonging to the *United States*, employed in that service?

The first question involves the consideration of principles of

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some extent, and to decide correctly on the second it may be necessary to state them generally.

Lien is generally defined to be a tie, hold, or security upon goods or other things which a man has in his custody till he is paid what is due to him. From this definition it is apparent that there can be no lien where the property is annihilated, or the possession parted with voluntarily and without fraud. 2 Vern. 117; 1 Ath. 234.

The claim of a lien otherwise well founded cannot be supported if there is,

1st. A particular agreement made and relied on. Sayer's Rep. 224; 2 R. A. 92. Or,

2d. Where the particular transaction shows that there was no intention that there should be a lien, but some *other security is looked to and relied upon*. 4 Burr, 2223.

If, therefore, in this case, the agreement between the defendant and the public agent actually was that he should be paid for feeding the public horses on as low terms as any other person on the road would supply them, he could not justify detaining the horses; for the particular agreement thus made, and under which the food was furnished, is the foundation of the remedy of the defendant, and it can be pursued in no other manner than upon that agreement.

Or, if there was no particular agreement, this case is such, that between the defendant and a private owner of horses and carriages employed in transporting the mail, I incline to think it could not legally be presumed a lien was ever intended or contemplated.

A carrier of the mail is bound not to delay its delivery, and under severe penalties, and it can scarcely be supposed that he would expose himself to the penalty for such delay by leaving his horses subject to the arrest of every innkeeper on the road for their food, or that in such case the innkeeper could look to any other security than the personal credit of the owner of the horses for reimbursement. But the law on such a case could be only declared on facts admitted by the parties or found by the jury, and is not now before the court.

3d. The great question in this case rests on a discrimination between the property of the government and individuals. To

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the government is granted by the Constitution the general power to lay and collect taxes, duties, imposts, and excises, to pay the debts, and provide for the common defence and general welfare of the *United States*; to raise and support armies; to provide and maintain a navy; to establish post-offices and post-roads; and to make all laws which shall be necessary and proper for carrying these and all other constitutional powers into effect.

The public money can never be drawn out of the treasury unless by consent of the legislature; but whenever a debt is contracted in the establishment of a post-office, or road, or in the support of an army, or in the provision for raising or supporting a navy, or any other measure of general welfare, the public faith and credit is pledged for its payment. On the public faith and credit advances are made to the government, relying on the constitutional mode of reimbursement. If it were otherwise, what dreadful consequences would not result? A ship-carpenter might libel public ships, a quartermaster retain the supplies of the army, or an inn-keeper stop the progress of an army for food to horses of a baggage-wagon. Every man must surely deprecate a state of society where no immunity to the government shall be afforded by the Constitution against such evils. Happily we are not so exposed. Congress only has the power, and it is bound by the most sacred of moral obligation and duty to provide for the payment of the public debts.

No other remedy exists for a creditor of the government than an application to Congress for payment.

A lien cannot be permitted to exist against the government; for liens are only known or admitted in cases where the relation of debtor and creditor exists so as to maintain a suit at law for the debt or duty which gives rise to a lien, in case the pledge be destroyed or the possession thereof lost.

As in the case of a carrier of the mail, he cannot sue for the hire nor retain the mail, because he cannot sue.

Yet the carrier of private property may sue or retain, because the government is not answerable. Justice is the same whether due from one to a million or a million to one man; but the mode of obtaining that justice must vary.

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An individual may sue and be sued. The *United States* cannot be sued.

Suability is incompatible with the idea of sovereign power. The adversary proceedings of a court of judicature can never be admitted against an independent government or the public stock or property. The ties of faith, public character, and constitutional duty are the sure pledges of public integrity, and to them the public creditors must, and I trust with confidence may, look for justice.

They must not measure it out for themselves. I have stated these principles to show that by law the defendant could not justify stopping the mail on principles of common law, as they apply to individuals and to the government.

There are, however, considerations arising from the act of Congress which are conclusive to my mind.

The statute is a general prohibitory act. The common law, if opposed, must give way to it, and the court is bound to decide according to the correct construction of that law.

That the act is constitutional is not, nor, indeed, can be questioned. It has introduced no exception. Whether the acts which it prohibits to be done were lawful or unlawful before the operation of that law, or independent of it, might or might not be justified, is not material. This law does not allow any justification of a *wilful and voluntary act* of obstruction to the passage of the mail. If, therefore, courts or juries were to introduce exceptions not found in the law itself, by admitting justifications for the breach of the act, which justifications the act does not allow to be made, it would be an assumption of legislative power.

Many exceptions might be introduced, and perhaps with propriety. For instance, *a stolen horse found in the mail-stage*. The owner cannot seize him. The driver being in debt, or even committing an offence, can only be arrested in such way as does not obstruct the passage of the mail.

These examples are as strong as any which are likely to occur, but even these are not excepted by the statute, and probably considerations of the extreme importance to the government and individuals of the regular transmission of public dispatches and private communications may have excluded these exceptions.

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But whatever may have been the policy which led to the adoption of the law, which the court will not inquire into, it totally prohibits any obstruction to the passage of the mail.

It is the duty of the court to expound and execute the law, and therefore I am of opinion and decide that the defendant is not justifiable.

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*United States Circuit Court, Eastern District of Virginia, at  
Richmond, 11th February, 1879.*

## UNITED STATES v. ADOLPHUS GITMA.

Rights of United States deputy marshals at the places of election. Limits of their power.

INDICTMENT for hindering and assaulting a deputy marshal in the discharge of his duty at an election for a member of the House of Representatives of the United States.

During the progress of the argument before the jury in this case the judge, in order to shorten the discussion, interrupted counsel with the following explanation of the law governing the case :

HUGHES, J.—There has been so much controversy and so much feeling on this subject that I think I ought to make use of this first occasion on which the court has been called upon to rule upon it, to set out its view of the law on the subject, so that officers of the United States will better know their duties and powers, from the only source competent to explain them in a binding and authoritative manner.

It is useless to consider the constitutionality of the law of Congress embodied in the Revised Statutes in regard to the duties of supervisors and deputy marshals of the United States during their attendance upon elections.

Section 4 of the first article of the Constitution of the United States provides that :

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The times, places, and manner of holding elections for senators and representatives shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by law make or alter such regulations, except as to the place of choosing senators.

There can be no doubt, therefore, of the constitutionality of the sections of the Revised Statutes about to be reviewed so far as they apply to elections for members of Congress. Their constitutionality is only brought in question when they are sought to be applied to elections for State officers.

The election, for conduct at which Gitma now under trial was indicted, was held for the election of a member of Congress.

Deputy Marshal Archer was in the room of the judges of election at Petersburg, and was ordered out, and in that way, but not by violence, was put out by policeman Gitma. Gitma stands indicted for the act. The question is, whether a deputy marshal had a right to be in the room of the judges by the law of the United States? The law makes a clear distinction between the powers of supervisors and the powers of deputy marshals during their attendance at elections.

As to supervisors the language of section 2019 is that "they are authorized and directed, in their respective election districts or voting precincts on the day of election, to take, occupy, and remain in such position, from time to time, whether before or behind the ballot-boxes, as will, in their judgment, best enable them to see each person offering to vote, and as will best conduce to their scrutinizing the manner in which the voting is being conducted," etc. Section 2017 gives the same authority in general terms.

Thus, not only does the law in terms empower a supervisor to be in the room with the judges of election, but empowers him to be in any place or position in which, in his own judgment, he can best perform his duties.

The act of Congress which is thus specific in defining and complete in conferring these powers on supervisors, is the same one which prescribes the duties of deputy marshals. While it is thus express and full in regard to supervisors it is the reverse in defining the authority of deputy marshals. Section 2021 simply provides that "when required" to do so by the supervisors it

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shall be the duty of deputy marshals to "attend the polls" in their districts or precincts. The section gives the deputy marshals no authority except to be present at the polls. The same act of Congress which expressly "directs" supervisors to place themselves before or behind the ballot-boxes as they may think proper, is silent in regard to deputy marshals, and gives them no such authority.

Section 2022 defines the object of the appointment of deputy marshals, and defines their powers and duties. It makes it their duty to "keep the peace, and support and protect the supervisors in the discharge of their duty; to preserve order at the voting-places; to prevent fraudulent voting, or fraudulent conduct on the part of any officer of election, and to arrest without process any person who commits illegal acts in their presence." It omits to give them authority to go behind the ballot-boxes and to place themselves in any position they please. This omission has much meaning, as showing that the powers and duties of marshals are different from those of supervisors. This same section 2022, while providing that the supervisors, in addition to their own powers, shall, in the absence of deputy marshals, have the same duties and powers as deputy marshals, omits to give the reverse authority; and neither this section nor any other section of the law gives to marshals, in the absence of supervisors, the powers and duties of supervisors proper. Their duties, therefore, are not those of supervisors of elections, but merely those of conservators of the peace at the polls.

My conclusion, therefore, is, that unless for the purpose of suppressing actual violence or of preserving the peace when actually disturbed, or protecting the supervisor when actually needing protection, or preventing fraud actually attempted, in the room, the deputy marshals have no right to be in the room in which the judges and supervisors of election are performing their duties, or to go behind "the ballot-boxes" unless requested to do so by both judges and supervisors. If Congress had designed that they should have that power (as it did design that supervisors should have it) it would have given it expressly (as it did give the power to the supervisors expressly). Unless it can be shown that their presence is required by the exigencies

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which have been mentioned, the judges of election have the same right to order deputy marshals out of their room as they have to order out any unofficial person.

The object of sections 2021 and 2022 is to define the powers and duties of deputy marshals, while the object of section 5522 is to define the offence and fix the punishment of persons who hinder and obstruct these officers in the performance of duties required of or authorized in them ; and when this latter section goes on to say that when a person obstructs them in doing what they are authorized by law to do, by specifying modes by which this obstruction may be committed, these latter clauses of the penal section of the law are not intended to give immunity and protection to deputy marshals in acts not authorized by sections 2021 and 2022. Though section 5522 therefore forbids any person from obstructing the deputy marshals or supervisors in doing acts which it names, and amongst others " from going to and from any room " where an election may be held ; yet these words are to be construed in connection with all the rest of this law on the subject, and must therefore be treated as applying only to supervisors of election, as they only, and not deputy marshals, are allowed by those provisions of the law designed to define the powers and duties of such officers to " go to and from the room " in which the ballot-boxes are.

The following is, therefore, the ruling of the court :

Unless it is shown that a disturbance of the peace has actually occurred, or violence is committed, or that one or the other is threatened, or that actual fraud is attempted, or that the supervisor is in actual need of protection, in the room of the judges of election, the deputy marshals of election have no right to be in the said room against the orders of the judges of election during the progress of the voting. But if there be actual disturbance of the peace, or other actual violence committed or threatened, or if the supervisor be in actual need of protection, or fraud be attempted in the said room, then the deputy marshal may enter the room for the purpose of discharging the duties imposed on him by section 2022.

*Nolle prosequi* was entered.

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*United States Circuit Court, Eastern District of Virginia, at  
Norfolk, January 22d, 1878.*

UNITED STATES *v.* HENRY MILLER.

If an indictment founded upon section 5440 of the Revised Statutes of the United States charges a conspiracy by two or more persons, but is an indictment of one only of such persons, it is good on demurrer.

INFORMATION for conspiracy to defraud the United States.

On demurrer to the information for not joining other conspirators as co-conspirators, the court said :

HUGHES, J.—The information is founded upon section 5440. That section makes the conspiring by two or more persons to defraud the government a punishable offence, and declares the commission of any act intended to effect the object of the conspiracy by any one of the conspirators to be a punishable offence in all of them.

A preliminary question has been raised on this section 5440, whether it makes the conspiracy to defraud the United States the offence for which it prescribes the punishment named by it, or whether it makes the act committed to “effect the object of the conspiracy” that offence. It is very clear from a critical examination of the language of the section, that the offence created by it is a conspiracy by two or more persons to defraud the United States. See *United States v. Donan and Flood*, 11 Blatchford, 168. It is on this view of the law that the demurrer is founded.

The question raised by the demurrer is, whether the person who is alleged to have committed the act in furtherance of the conspiracy can be indicted separately ; that is to say, whether it is not necessary to indict at least two persons charged with engaging in the conspiracy, in order for the prosecution to be valid.

There has been much loose writing on this question by some of the authors of textbooks on criminal law, and they have con-

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founded rather than enlightened us with their counsels. We may, therefore, have to cut loose from them, and resort to the authoritative decisions of the courts, and the teachings of reason in the decision of the question before us.

It may be worth while to say that conspiracy is the combination of two or more persons, by concerted action, to accomplish some unlawful purpose, or to accomplish a lawful purpose by some unlawful means. There can, therefore, be no conspiracy except by two or more persons. "If any two or more persons conspire," is the language of the statute upon which the present information is founded. It is, therefore, certainly incumbent upon the prosecution to prove a conspiracy here by two or more persons. The establishment of a conspiracy by proof is essential to a conviction. Nothing is more clearly settled than that the *proof* must show a conspiracy by two or more persons to do the unlawful act mentioned by the statute, whether or not the *indictment* be brought against more than one.

But whether or not two or more persons must be proceeded against jointly in the same indictment, is another question.

This information charges a conspiracy by three persons, one of whom, Lee, is dead, and another, Gettslick, is already under conviction in this court for an act committed in furtherance of the conspiracy charged. It is not the practice of the government to prosecute any person to conviction for more than one of the same series of offences. Hence there is no indictment here except against Miller, who is the last one of the three persons charged to have conspired to defraud the government who has not been convicted. The particular question arising on the demurrer, therefore, is, will an information against him alone lie without joining Gettslick.

There is no doubt that if Gettslick were joined there could be a severance in the trial of the joint information. Nor is there any doubt that if there are three persons indicted for conspiracy one could be acquitted and the other two convicted; that is to say, that there could be a severance in the verdict. And it is equally clear that if the verdict be severed the judgment of the court upon the verdict must be several. It is true that where three or more are joined in an indictment for conspiracy, and

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some are acquitted by the jury, and others convicted, on motion for a new trial by one of the convicted, the court, if granting the motion of that one, would order a new trial for all the convicted. But that would be on principles of humanity, leniency, and abundant caution; and not as a matter of strict right. *Regina v. Gompertz et al.*, 9 Queen's Bench, 824.

As there may thus be a severance in the trial, in the verdict, and in the judgment, that is to say, in every part of the proceedings except the indictment, we may conclude that there may be also a severance in an indictment for conspiracy, unless there be some reason peculiar to such an indictment plainly making the several proceeding improper. I can see no such reason. It will not do to say that because two at least must be convicted of a conspiracy, and that any one person who should be the only one convicted must be discharged; therefore, two at least must be joined in the indictment. But that same reasoning would forbid the severance of the trial, and deprive any one of the accused of his right to be tried alone. If it be conceded that there may be a severance in the trial of persons jointly indicted for conspiracy, it follows, so far as the reason just alluded to is concerned, that there may likewise be a severance in the indictment.

Some of the text-writers say, arbitrarily, that indictments for conspiracy must be joint, but they give no reason, other than the one just stated, for their proposition, and it is difficult to find a reason. I do not think any sufficient reason exists.

We are, therefore, thrown back upon the decisions of the courts, and I do not find any decision requiring that indictments for conspiracy must in all cases be joint. In the case of *United States v. Cole and others*, in 5 McLean, 513, there was an indictment of twelve persons named, charging a conspiracy by them and one other person who was alleged to be dead, and there was no averment that any persons other than the thirteen were concerned in the conspiracy. There the court charged the jury, virtually, that if they acquitted all those who were indicted save one, that one would go quit even though they found him guilty. As that indictment did not charge that the persons named and other persons besides conspired, the charge was, of course, strictly

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in accordance with the law of the case. But that charge of the court does not intimate, and carries no authority for the proposition, that an indictment of each one of those accused persons severally would not have been good.

The case of *The People of New York v. Elihu Mather*, 4 Wendell, 229, is a celebrated one. The charge of the indictment was of a conspiracy to abduct William Morgan, who was supposed to have revealed the secrets of the Masonic Fraternity. The indictment was of Mather alone, and the charge of the indictment was that Mather with "other persons unknown," had conspired, etc., although it was a fact that many of the other persons were well known. There the court held that the indictment against Mather alone was good, and there was a conviction, and a new trial was denied. The court said that "in a charge of conspiracy it seems no more necessary to specify the names of the defendant coadjutors than in an indictment for an assault and battery to name others besides the accused who were concerned in the trespass."

In the leading and early case of *Rex v. Kinnersley and Moore*, 1 Strange, 193, the information charged that two named persons, Kinnersley and Moore, had conspired. Moore was not found, and the trial proceeded on the information as against Kinnersley alone. Kinnersley was convicted, and a judgment, after review by *certiorari*, was given against him, before the arrest and trial of Moore.

There was a similar judgment in the case of *Rex v. Nicholls*, reported in 13 East, 412, in note. There but one of two named conspirators was indicted, the other being dead. There was a verdict of guilty, and on review by *certiorari*, a judgment of conviction. It was a single indictment.

The latest and best of the text-writers on criminal law, Mr. Bishop, reviewing all the cases, lays it down as his conclusion that there need not be more than a single person made defendant in an indictment for conspiracy. 2 Bishop Cr. Pro., section 186. I think that is a true statement of the law of the subject.

But it is essential, as I stated in the beginning, that the information shall *charge* that two or more conspired, and, of course, it follows that the proof must implicate two or more persons.

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The language of the statute on which the information now under trial is founded, is that "if two or more persons conspire," etc. Such is the charge in the present information, and I decide very confidently that the information is sufficient in law, and so the demurrer is overruled.

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*United States District Court for the Eastern District of Virginia,  
at Alexandria, January 11th, 1878.*

## UNITED STATES v. A. C. BRAMHAM.

Postmasters have a very limited right, if they have any at all, to act as agents of citizens to open their letters and use money inclosed.

INDICTMENT under section 5467 for embezzling a letter having a ten-dollar note, in one count charged that the note was a United States treasury note, the other that it was a national bank note. Rose Kelly, a colored servant woman, mailed a letter addressed to Monaskan, Lancaster County, Va., having in it a ten-dollar note, to John Kelly, her father, on the 16th of November, 1876, at the Philadelphia post-office; and had the letter registered. From a *tracer* afterwards sent out, the certificate of A. C. Bramham, postmaster at Monaskan, stated that the registered letter was received there on the 21st of November, 1876. John Kelly, who was an unlettered negro, made repeated inquiry for the letter at the office with no avail. Letters, in the handwriting of Bramham, in the name of John Kelly, to Rose, were put in evidence, one of them dated on the 19th of June, 1877, stating that the money had not been received; the other dated on the 20th of June, 1877, stating that it had been received. Some time in July following Bramham took to John Kelly Rose's original letter which had contained the money, and gave it to him, but did not give him the money. On the 3d of August, 1877, Bramham paid to John Kelly two five dollar notes, and took from him his receipt signed by cross-mark in the presence

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of a witness for the registered letter. The witness to John Kelly's cross-mark did not observe the date of this receipt, but it bore that of the 14th of March, 1877. John Kelly said that occasionally when he had got letters at the post-office, he had asked Mr. Bramham to read them for him. On a few occasions he had got Bramham to write letters to his daughter for him. He denied that he had ever authorized Bramham to open his letters or to act as his agent, or to open this particular letter. Bramham was arrested in Baltimore, Md., on the 17th of August, 1877, and when arrested, said to the officer that this was his first offence. On the 27th of August a brother-in-law of Bramham had a conversation with John Kelly, in which, he said, that Kelly had told him that he had authorized Kelly to open his letters and to act as agent for him.

There was evidence that Bramham had borne a high character.

During the argument to the jury of Bramham's counsel, in which they rested their defence on this alleged agency, counsel cited and read sundry legal authorities as to what constituted agency and some wherein courts had held that one person might authorize another to take his letters from the post-office, and open and read them, and that in such case there was no embezzlement of the letter.

The court, Hughes, J., interrupted counsel when so engaged, and said that a postmaster occupied such a relation to the service and to the public as to make such a general agency incompatible with his fiduciary trust; and put in the form of an instruction what it considered to be the law of the subject, as follows:

A postmaster of the United States ought not to be the agent of any customer of his office to open his letters and take out of them, and use, their contents. Such an agency is incompatible with the duties of a postmaster; and very strict proof ought to be required by the jury of such an agency, expressly granted and conceded by the real owner of the letters.

The judge said there was no express law forbidding postmasters to open letters addressed to others at their offices, etc., but many of the postal laws contained clauses implying the impropriety of such a practice. For instance, section 300, p. 22, of the

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postal laws compiled in 1873, and section 300, p. 90, of the same volume, were examples of such laws. They contain provisos in the words "nothing in this act contained shall be so construed as to authorize any postmaster or other person to open any letter not addressed to himself."

Such is the spirit of all our postal laws; and no postmaster has a right to open any letter without express and particular authority from its owner to do so.

The following instruction was also given :

To constitute an offence under this indictment, *some evidence* is necessary of the genuineness and value of the note charged to have been stolen out of the letter.

There was a verdict of guilty.

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*United States Circuit Court, Western District of Virginia, at  
Danville, November, 1878.*

EX PARTE BURWELL REYNOLDS AND LEE REYNOLDS.

A writ of *habeas corpus* granted by a Circuit Court of the United States commanding the sheriff of a county to bring the bodies of two colored persons before the said court with a statement of the cause of their detention, the court proceeding on the allegation of the petition of the prisoners, that being colored persons they had been tried capitally before a State court by a jury exclusively white, in contravention of section 641 of the Revised Statutes of the United States.

ON petition for the writ of *habeas corpus*.

At the April Term of the Circuit Court of Patrick County, Virginia, Burwell Reynolds and Lee Reynolds, under the age of twenty-one, were arraigned and led to the bar for trial under an indictment charging them with the murder of one Aaron C. Shelton.

Thereupon they, by counsel, in the language of the record :

Moved the court that the venire in this cause, composed entirely

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of the white race, be so modified as to allow one-third of the venire to be composed of their race, they being colored, which motion was overruled upon the ground that the court had no authority to change the venire, it appearing that the said venire had been regularly drawn from the jury box according to law. The accused, by counsel, then appealed to the attorney for the Commonwealth and the counsel assisting in the prosecution, that as the ballots in the jury box were entirely of the white race, they, the attorney for the Commonwealth and feed counsel for the prosecution, allow the motion, the accused waiving all objections to the illegality of so constituting the jury, which the attorney for the Commonwealth and the feed prosecutors refused. Thereupon the accused, by counsel, filed their petition, verified by their affidavit, praying that this prosecution may be removed to the next Circuit Court for the United States for the Western District of Virginia, in the town of Danville; which prayer was denied by the court.

Thereupon the following petition was presented to the judge of the Circuit Court of Patrick County :

Your petitioners, Lee Reynolds and Burwell Reynolds, represent that there is now pending against them a criminal prosecution in the Circuit Court of Patrick, in which they are charged with the murder of one Aaron C. Shelton. Your petitioners are negroes, aged, respectively, seventeen and nineteen; that the man whom they are charged with having murdered was a white man. Your petitioners allege that the right secured to them by the law providing for the equal rights of citizens of the United States is denied to them in the judicial tribunal of the county of Patrick, of which county they are natives and citizens.

They allege that by the laws of Virginia all male citizens, twenty-one years of age, and not over sixty, who are entitled to vote and hold office under the Constitution and laws of this State, shall be liable to serve as jurors. This law allows the right as well as requires the duty of the race to which they belong to serve as jurors. Yet the grand jury who made the indictment against them, as well as the venire summoned to try them, are exclusively composed of the white race. They have applied through their counsel to your honor, the judge of the said court, and also to the prosecuting attorney of said county, as well as to the feed counsel employed to assist in the prosecution, that a portion of the venire by which they are to be tried in the said Circuit Court of Patrick, should be at least in part composed of competent jurors of their own race and color. This right has been refused them.

They allege that a strong prejudice exists in the community of said county against them, independent of the merits of the case, and based solely upon the fact that your petitioners, the accused, are

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negroes, and the man whom they are charged with having murdered was a white man. From this fact alone they are satisfied that they cannot obtain an impartial trial before a jury composed exclusively of the white race. They further allege that their race have never been allowed the right to serve as jurors, either in civil or criminal cases in the county of Patrick in any case, civil or criminal, in which their race have ever been in any way interested up to the present time. Your petitioners, therefore, pray that the said prosecution may be removed to the next Circuit Court to be held for the United States for the Western District of Virginia in the town of Danville.

This petition was sworn to according to law. The petition was denied.

The accused then of course went to trial before a jury composed of white jurors, they having elected to be tried separately. Burwell R., the younger boy, was convicted of murder in the first degree. Upon a motion for a new trial, the verdict was promptly set aside without argument. Lee Reynolds was then put upon trial, which resulted in a verdict of murder in the second degree, and sentenced to the State penitentiary for fifteen years. A motion was also made in this case for a new trial as contrary to law and evidence, which was overruled. His counsel asked and obtained a certificate of the facts from his honor, the judge. They were obtained in order to take the case of Lee by writ of error to the Court of Appeals of Virginia. The facts, however, were the same in both cases.

The facts certified are as follows :

That Aaron C. Shelton had become provoked, some time preceding the homicide, because a younger brother of his had been ducked by the children of a negro school, for hallooing "school-butter," of which school Lee Reynolds was a member. His brother, Burwell Reynolds, who was jointly indicted with him, took an active part in the ducking. This occurred about two weeks before the homicide. On Tuesday morning preceding the homicide, Aaron C. Shelton passed the house in which the school was then in session, and halloed "school-butter," and passed on to his work undisturbed, about four hundred yards, to where he was to load his wagon with saw-logs, in

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which business he was at that time engaged. At recess of the school on the same day—the teacher having left the school in charge of one of the grown and advanced scholars—another brother of Aaron C. Shelton, probably thirteen years of age, approached the schoolhouse at the distance of one hundred and fifty steps and halloed “school-butter.” The school children then pursued him until they arrived at where Aaron C. Shelton was standing in the road, with a stick in his hand; his uncle, Asa Tuggle, being present. Some altercation took place between Aaron C. Shelton and the school children, they retreating and he pursuing with a *rock* and stick, stating that his brother had been ducked a short time before, and that he might pass there when he damn pleased and halloo “school-butter,” and if he was ducked again he would shoot their heart-strings out, and if necessary, would follow them into the schoolhouse to do so, and if the teacher interfered he would shoot him.

Neither Burwell nor Lee Reynolds was present on this occasion, being engaged at that time at work on their father’s farm. Shelton, however, approached a sister of Burwell and Lee Reynolds, shook a stick over her head, and asked who it was that called him a rogue? She said nobody, and asked him what all this meant? He replied, one of your brothers ducked one of my little brothers some time ago. She said her brother did not duck his brother, but only patted a little water on his head. Shelton then said he would pat for him. Shelton then used abusive language to her, which the witness declined to repeat in court. Mary Burwell, one of the witnesses for the defence, informed Burwell and Lee Reynolds that evening of the manner in which Aaron C. Shelton had abused their sister. Late in the evening of the same day, Aaron C. Shelton, returning home from work, found Burwell and Lee Reynolds trying to roll one of the saw-logs cut by his uncle, which he was going to carry to the sawmill, out of the road. A road had been cut by the uncle of Aaron C. Shelton by which any one could pass around the logs. Shelton asked Burwell and Lee Reynolds what they were doing? They said they were going to roll the logs out of the road. He cursed them, and told them if they did he would thrash them.

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Burwell and Lee Reynolds passed on around the logs after the threat, to the negro schoolhouse before mentioned, which was on their way home, and then stopped. When Aaron C. Shelton arrived at that place, which was also on his way home, he found them standing on the roadside with a stick and axe. They addressed Shelton, and Lee Reynolds told him they were going back to the log at which he had just found them, the next morning, and were going to roll it out of the road, and if he, Shelton, interfered, they would shoot him, and if he ran, they would make their dogs catch him. This threat was denied by Burwell Reynolds, who was introduced as a witness. Green Shelton, the brother of Aaron C. Shelton, was the witness to this threat. Aaron C. Shelton passed the schoolhouse Wednesday and Thursday for the purpose of hauling the saw-logs which had been cut, without any further interference with the school. On Thursday, about 3 o'clock, he went to load a log on his wagon, which was lying in the road about a quarter of a mile from the log Burwell and Lee were trying to roll out of the road. When he got in sight of the log he intended loading, he saw Burwell and Lee Reynolds standing within fifteen steps of the log. They had been hauling corn from their father's farm, and were returning home by the usual road, and had driven their slide, to which was attached a horse and an ox, outside of the road. As they came up to this point they found a log lying across the road; they passed around this log through a space made by Shelton in removing one of the saw-logs below the road, and stopped. When they were first seen by Shelton they could have seen Shelton at a distance of eighty yards in the road before he reached them, and could have heard him coming about two hundred yards. He came in a fast walk. The track was a single track, with a fence on one side, woods on the other, and two such vehicles could not pass each other without one giving the road. Burwell Reynolds, who was driving the slide, with a little loading on it, left the main track, and drew his slide out of the road down below, and with the head of the ox and horse turned in a direction nearly diagonally with the road. The wagon was found in the road exactly opposite the rear of the slide. Between the

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wagon and slide, directly between the fore and hind wheels of the wagon, Lee Reynolds was found standing with a gun and stick. Shelton stopped his wagon about fourteen paces from the log which he intended loading. Shelton had hauled a log the day before and stopped his wagon at a position further from the log than he did this day. There was a log across the road when Shelton hauled the first log. He could have stopped at that point and loaded, or could have gone further and turned around and then loaded. When Shelton stopped his wagon he asked Lee what he was doing with that stick. There was a conflict of testimony as to whether he said he had a right to carry his stick, or whether he said, if you will get down, God damn you, I will show you. Shelton ordered him to drop the stick, and got out of his wagon. The testimony conflicts as to whether he dropped the stick, or whether Aaron C. Shelton took it from him. Shelton pursued him; and there was a conflict of testimony as to whether he attempted to draw the gun on Shelton or not, while he (Lee) was retreating and Shelton pursuing him. Shelton pursued him twelve or fifteen paces and struck him, knocking him over the log; and at that time Burwell Reynolds ran up and stabbed Shelton in the back with a large butcher-knife, which had been used for a tobacco-knife. It was further proven that Lee Reynolds was found immediately afterwards about fifty yards from the place of the homicide in the woods with his gun cocked. Burwell fled the country; Lee did not. It was further proven that Aaron C. Shelton was a young man twenty-two years of age, of extraordinary physical development, weighing one hundred and sixty pounds. Lee and Burwell, colored boys, respectively eighteen and nineteen years of age. It was further proven that Burwell and Lee were in the habit of carrying the gun, but not the stick and knife; and that Burwell left his place of business to see what he could pick up, and got the knife off the tier in the barn, the barn being two hundred yards from his residence.

Such were the facts as certified by the judge at the April Term, 1878.

At the trial, at the special term, 28th of October, 1878, the

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same testimony substantially as above stated, was adduced. The only variance was in substance this: That on Wednesday, Aaron C. Shelton received a message purporting to come from Lee Reynolds, saying that he intended to move that log, and that he had his gun with him, and if he (Shelton) interfered with him he would shoot him. On Wednesday morning, the day after the difficulty at the schoolhouse, the prisoners went back to their farm; and on their way they were informed by Asa Tuggle, the uncle of the deceased, that Aaron C. Shelton told him (Tuggle) to tell them that if he, Shelton, caught them on that road, he would beat them. They received the same warning from the same source on Thursday morning. They went on to their farm along the said road, finished their work, and about 3 o'clock P.M. were returning on the same road, Burwell driving the slide with some little loading on it; Lee was walking in front with a gun and stick in his hand. They came to a tree across the road, which had been cut by the said Asa Tuggle, after they (the prisoners) had gone down in the morning to their farm; it was cut in two saw-logs; the second cut had been hauled away; there was one across the road. The prisoners moved the log out of the road to pass with their slide. While in the act of moving the log, Asa Tuggle, who cut the log across the road, and was engaged for that purpose by the deceased, said: "Now, boys, you have moved that log, and you must take the result." Burwell drove on up the road, which was a single track, about fifteen paces, turned short around the tree into the bushes out of the road. The deceased drove his wagon up opposite the rear of the slide in the only track a wagon could have passed, and stopped at least five or ten paces before it was necessary to have stopped in order to load his log, but had stopped further from the log on the day before, and the slide could have passed out behind the wagon after it stopped. There was a conflict of testimony at this point as to how the difficulty occurred. Whether Lee Reynolds drew the stick upon the deceased, or whether the deceased ordered him to drop it, but that the deceased did get the stick into his possession, and that Lee Reynolds backed and the deceased followed him in a scuffle over the gun for fifteen paces, until the prisoner

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got to the log. Then Shelton struck him with the stick and knocked him over the log. At this moment Burwell Reynolds, who was with the slide, came up from the rear and stabbed Shelton in the back with a large tobacco-knife. It was proven that it was eighty yards from the slide to where Shelton was first seen with his wagon by the prisoner, and that the slide could have passed the wagon at another and better place in that distance. The case was taken to the Court of Appeals upon these facts. There was no hesitation in granting Lee Reynolds a new trial. I am certain that Attorney-General Field approved of the decision of that court. At the November Term, 1878, both cases came up again for trial. Before the trial of either of the prisoners the following order was entered upon their motion:

*Commonwealth v. Lee and Burwell Reynolds: Indictment for Murder.*

The prisoners, Lee and Burwell Reynolds, before the impanelling of the jury for their trial at this term, charged with the murder of Aaron C. Shelton, moved the court to remove said prosecution to the next term of the United States Circuit Court to be held in Danville, Virginia, upon the ground set forth in their petition, filed and presented at the April Term, 1878, of this court, which motion was again overruled and the prayer of the petitioners refused.

They were again tried before exclusively white juries, having elected to be tried separately. There was a "hung jury" in the case of Burwell Reynolds, eleven for murder in the first degree, one dissenting.

In the case of Lee Reynolds, a verdict for murder in the second degree and sentence to confinement in the State prison for eighteen years instead of fifteen, as on first trial. A motion was made for a new trial in this case and overruled. The facts proven were certified, but with no very material difference from those in the first case. The facts are incorporated in the statement given above.

The cases ended here in the State courts, except the sentence of the court, directing the sheriff to take Lee Reynolds to the State prison, to be there confined for the term of eighteen years.

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An application was then made in the ordinary form to Judge Rives, District Judge of the Western District of Virginia, by petition, for a writ of *habeas corpus*, and the same was obtained and heard at Danville, at the November Term, 1878, and the prisoners, by his writ, taken from the jail of Patrick County by the United States marshal, by him to be held in custody to be tried in the United States Circuit Court for the offence with which they stood charged in the State court, but to be tried by a *mixed venire* of both *white and black*.

The following is the opinion delivered by the judge on the questions of law raised by the petition for the writ :

RIVES, J.—I am aware that this application presents questions of novelty, gravity, and delicacy. The law on which it is founded is not familiar to the bar generally, and far less so to the public at large. Hence any action under it is liable to be misunderstood and misrepresented ; and thus to give rise to undue excitement, disquiet, and popular disturbance. This particular enactment has not been authoritatively construed ; though some light is thrown upon it by decisions of the Supreme Court upon kindred parts of the same general legislation for the enforcement of civil rights under the late amendments of the Constitution. Anything like a conflict of jurisdiction between the State and Federal courts ought to be avoided whenever it is possible ; and it is to be presumed that each respective set of tribunals will be animated by an equal and common desire to obviate all such interference. Both judicatories are alike subjected by article 6 of the Constitution of the United States to that Constitution and the laws of Congress made in pursuance thereof, and it is expressly added that “the judges in every State shall be bound thereby, anything in the constitution or laws of the State to the contrary notwithstanding.”

Even where unavoidable, such conflict is apt to disturb the harmony and interrupt the peaceful action of the two governments ; to shock the just sensibility and excite unduly the apprehensions of the public. In the consideration, therefore, of this case, I felt I would best consult my own peace and the popular

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repose if I could find the means thereby of reconciling my duty with a denial of this petition. But, of course, paramount to such considerations was my wish and determination alike to execute the laws of Congress in behalf even of the humblest, so as to insure the equal protection of all citizens as guaranteed by the 14th amendment of the Constitution.

It is not necessary to state such facts of this application as are necessary to the presentation and clear understanding of the question I am to decide. The immediate and last petition here is for a *habeas corpus*; upon examining the record upon which it is predicated, it will be seen that the parties presented their petitions to the State court before a trial of their cases for the removal of them to this court. Before doing so, however, their counsel asked of the State judge to so reconstruct the jury as to place some of their race and color, qualified according to the laws of the State, upon the venire, on the ground that they could not expect an impartial trial by a jury wholly alien to them in race and color. They were denied this right, and in consequence thereof, and upon the allegation of this denial of the equal protection of the laws, they then submitted to the State court their petition for removal, and now, on the first day of this term, filed the same in this court, asking the cause to be docketed here.

Taking the whole case together, I regard it as a petition for *removal* which necessarily leads to the remedy by *habeas corpus*, which they invoked by the more recent petition submitted to me in vacation, the hearing of which I adjourned to this term. After trial and sentence of one of the petitioners, on the mere statement thereof, it would seem the period had passed for removal. In the case of *The Justices v. Murry*, 9 Wallace, 274, it was properly held that the 5th section of the act of Congress of March 3d, 1863, allowing a removal by writ of error and other process to the Circuit Court within six months after rendition of judgment, was *unconstitutional* because contrary to the 7th amendment of the Constitution of the United States, declaring that no fact tried by a jury shall be otherwise re-examined in any court of the United States than according to the rules of the common law. This decision was rendered in December, 1869. The act

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passed April 9th, 1866, entitled "An act to protect all persons in the United States in their civil rights, and furnish the means of their protection," provided for removals of causes to Federal courts in compliance with this act thus subsequently pronounced unconstitutional in this particular.

Hence, as the law now stands, the petition must be filed in the State court before *the trial or final hearing*. This was done in this case, but the court overruled the petition and proceeded to the trial, notwithstanding the explicit declaration in section 641, that "*upon the filing of such petition all further proceedings in the State courts shall cease and shall not be resumed except as hereinafter provided.*" What effect if any shall be given to a trial thus had may be best determined by the language and reason of the law. I therefore quote the two sections, 641, 642, omitting therefrom only the terms embracing the case of officers, civil or military, or other persons, for any arrest or imprisonment or other trespasses or wrongs made or committed by virtue of and under color of authority derived from any law providing for equal rights as aforesaid. By this omission the application of the law to the case at bar will be more clearly and compactly seen. For future comments it is proper to give the two sections, with this disembarrassment of other matter, at length and verbatim.

Section 641, Revised Statutes United States, edition 1878, p. 115:

When any civil or criminal prosecution is commenced in any State court for any cause whatever, against any person, who is denied or cannot enforce in the judicial tribunals of the State, or in the part of the State where such suit is prosecuted, any right secured to him by any law providing for the equal rights of all citizens or of all persons within the jurisdiction of the United States; . . . . .  
 . . . . . such suit or prosecution may, upon the petition of such defendant, filed in the said State-court at any time before the trial or final hearing of said cause, stating the facts and verified by affidavit, be removed for trial into the next Circuit Court to be held in the district where it is pending. Upon the filing of said petition, all further proceedings in the State courts shall cease, and shall not be resumed except as hereafter provided. But all bail and other security given in such suit or prosecution shall continue in like force and effect as if the same had proceeded to final judgment and execution in the State court. It shall be the duty of the clerk of the State court to furnish such defendant petitioning for a removal copies

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of said process against him, and of all pleadings, depositions, testimony and other proceedings in the case. If such copies are filed by said petitioner in the Circuit Court on the first day of its session the cause shall proceed therein in the same manner as if it had been brought there by original process, and if the said clerk refuses or neglects to furnish such copies, the petitioner may thereupon docket the same in the Circuit Court, and the said court shall then have jurisdiction therein, and may upon proof of such refusal or neglect of said clerk, and upon reasonable notice to the plaintiff, require the plaintiff to file a declaration, petition, or complaint in the cause, and in case of his default may order a nonsuit and dismiss the case at the cost of the plaintiff, and such dismissal shall be a bar to any further suit touching the matter in controversy. But if without such refusal or neglect of said clerk to furnish such copies, and proof thereof, the petitioner for removal fails to file copies in the Circuit Court, as herein provided, a certificate under the seal of the Circuit Court, stating such failure, shall be given, and upon the production thereof in said State court the cause shall proceed therein as if no petition for a removal had been filed.

## Section 642, Id., p. 116:

When all the acts necessary for the removal of any suit or prosecution as provided in the preceding section have been performed, and the defendant petitioning for such removal is in actual custody on process issued by said State court, it shall be the duty of the clerk of said Circuit Court to issue a writ of *habeas corpus cum causa*, and of the marshal by virtue of such writ to take the body of the defendant in his custody, to be dealt with in said Circuit Court according to law, and the orders of said court, or in vacation, of any judge thereof; and the marshal shall file with or deliver to the clerk of said State court a duplicate copy of said writ.

The only warrant for these enactments is to be found, if at all, in article 14 of the late amendments to the Constitution. If they do not come within the designation by section 5 of this article of "legislation appropriate to the enforcement of the provisions of this article," then they are reprobated as void under the decisions of the Supreme Court in the case of *United States v. Reese et al.*, 92 U. S. Reports, 214, and *United States v. Cruikshank*, Id. 542. Let us, therefore, explore the language and scope of the first section of this article. It is as follows:

Any persons, born or naturalized within the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make and en-

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force any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the law.

It is conceded that this inhibition applies exclusively to *the State*. But that term presents a complex idea. A State is a sort of trinity; it exists, acts, and speaks in three capacities: legislative, executive, and judicial. What is forbidden to it in one capacity is forbidden to it in each and all. It may not infringe this article by *legislation*, but it may equally do so by its courts or its executive authorities. Hence, it seems to me, it is in strict pursuance of this article to base the intervention of the Federal courts on the inability to enforce in the judicial tribunals of the State or in some part thereof the equal civil rights secured by this article. The mischief is the same whether the deprivation proceeds from the law, the courts, or the executive. It is equally attributable to the State. The laws of the State may be all conformable to the requirements of this article, but its infraction may rest with the courts or executive authorities of the counties. The amendment, to be potential and attain its end, should be enforced, as these enactments purport, by providing a remedy for the dereliction, in whatever quarter it may appear. Hence, to find a *casus* for the application of this law of Federal intervention under the theory of this article, we are not restricted to the action of the legislature alone; it clearly contemplates the failure of executive or judicial remedies for the enforcement of these equal civil rights. But it is objected that this article is silent as to the right or mode of trial of colored persons accused of State offences. A constitutional provision is necessarily general and never descends to detail. It merely ordains equality of rights and protection to all. In the time of slavery, these persons were not entitled to trial by jury; they were tried by a court of five justices. Will it be pretended that that mode of trial could now be reconciled to this amendment because silent on this point? It is sufficient to answer that it guarantees to them the equal protection of the laws, which obviously includes the same mode of trial and the same measure of punishment. In the same mere technical spirit it is said there is nothing in this article

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giving colored persons, or indicating for their trial, *mixed* juries. But inasmuch as a major proposition in logic includes the minor premise, this equal protection can only be had in criminal trials through juries composed of the same persons, and constituted in the same mode as well for negroes as for whites. If a mixed jury is allowable by the State law in all cases, for a stronger reason is it right and permissible for a trial of a negro? In the latter case a white panel cannot be imputed to chance; it must be taken as the result of design in derogation of his right to a fair jury for his trial. The State law is not in fault here. Under it all voters are competent jurors, the selection devolving on the county judge; so that no discrimination is made by it on account of color or race. I have endeavored to follow as closely as practicable this State law in the selection of my juries at this bar. What would be thought or said of me if I, against remonstrance, impanelled negroes exclusively to try white men for offences; and yet the same anomaly and injustice exists in trying negroes by juries of white men alone. The State law, as well as this amendment, guarantees to this lately enfranchised class the same sort of juries for their trial as should reasonably follow from the deliberate omission in the law of any discrimination on account of color or race. The demand, therefore, to reconstruct the venire under the direction of the presiding judge, so as to allow some representation of the prisoner's race upon it was, as it seems to me, in conformity with the law of the State, and a just concession to the spirit of this amendment. I see nothing in the State law to forbid it. On the contrary, ample discretion to that end is reposed with the judge by the Code of Virginia, chapter 158, sections 16, 17, p. 1062. The question recurs, Was not its denial under the circumstances a denial to the prisoner of the equal protection of the laws? It is greatly to be deplored that no uniform practice obtains in this regard throughout the Commonwealth though the law is the same everywhere. I am informed that the judge of this county invariably gives the accused, when colored, the benefit of a mixed jury; and that it is believed that no harm has ever resulted from it, or any failure of punitive justice. The same, I am told, is the practice in other counties of the Commonwealth; and, I trust, one of the effects of the agitation of this

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question will be to extend it. If this should become general or be required by law, all pretence for Federal interference would be removed; and the law and practice would conform in leading to the just enforcement of equal civil rights to all colors and races. If negroes were to be tried by former slaveholders, once allied to them by interest, affection, and sympathy, the danger might not be great; but if these people are to depend for their lives, liberty, and property on the white men who never knew or felt these ties, I regret to say they are without the guarantees enjoyed by others from the jury trial secured by article 6 of the amendments to the Constitution.

From this comparison of the law of Congress with this amendment, I am constrained to conclude that the former strictly pursues the latter, is in conformity thereto, and therefore constitutional. Had I come to a different conclusion I should have felt bound to disregard these enactments. True, I should have felt all the delicacy becoming an inferior judge in pronouncing a law of Congress unconstitutional; but I should not have shrunk from the responsibility of doing so if, on mature reflection, I should have come to that conclusion. It is a well-settled doctrine, even in courts of the last resort, that a law is not to be lightly pronounced *unconstitutional*; and never in a case of doubt. The reasonable presumption is in favor of its constitutionality. But it is because I believe the Constitution and the law both require it of me, I grant the relief sought of me; surely not under the ridiculous idea that I have any jurisdiction over State crimes or any authority to prosecute them; but merely to secure for the petitioners here the equal protection of the laws of the State as guaranteed by the 14th amendment and the law in pursuance thereof. No one can be more sensible than I am of the anomaly of trying these cases at my bar; I have nothing to say of the wisdom, the expediency, or fitness of this legislation; the least I can say is that it gives an anomalous jurisdiction to this court, not easily understood or reconcilable with past practices, but it is sufficient for me to be convinced that I am thus directed by Congress in legislation, which they have deemed appropriate to the enforcement of this fundamental part of its reconstruction policy. Nor do I see how any mind conceding the constitutionality of

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these enactments can arrive at any other conclusion than the absolute right of the parties under the terms of the law to this relief. It ought to be observed that the trial had in one of these cases was in plain defiance of the law which directed all further proceedings to cease on the filing of the petition. That trial must, therefore, go for nothing in this case if I am to be governed by the plain terms of these enactments. The law left nothing to the discretion of the State judge, save the implied discretion to deny the petition; but such denial was to avail nothing; the case was thereby arrested, and the question remitted to this court at its first session thereafter. I presume as the county of Patrick is annexed by the ruling of this court to the court held at this place, this term may well be regarded as the first after the filing of these petitions. This is the next Circuit Court in the terms of the law held for this part of the district where parties reside, and whence witnesses are to be summoned.

I have treated this exclusively as a question of removal, and not as application for a *habeas corpus*, as I have already premised. I take no note of the allegation of petitioners that they believe and declare they cannot get a fair trial in the State court; that is alien to the merits of their application, and has no rightful place here. Their relief and the removal they seek can alone be predicated of some obstruction to their impartial trial arising out of the action of the court, and the selection of a jury with reference, whether designed or not, to color and race. In case of Federal officers, indicted in the State courts for *State offences*, I have under this law exercised the same jurisdiction without objection from any quarter.

If there shall be found on inquiry a want of uniformity, or even semblance of injustice in the practice of the judges or courts in the particular I have named, it is fair to presume it will be rectified in time to avoid this unseemly collision and anomalous interference with the trial of *State offences*. If there be anything unfair and repulsive to the instincts of justice, and in conflict with all our notions of jury trial in trying negroes exclusively by white men, wholly alien to them in interest and feeling, it admits of speedy redress by the State. I can conceive of no stronger motive on the grounds of humanity and practical states-

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manship than that which now exists with the State, who enjoys the fruits of her restoration to the Union by virtue of her formal ratification of this amendment, to observe on her part in all the departments of her service, scrupulously, both in spirit and in deed, its requirements, and to guard and protect beyond all unfriendly cavil the civil rights of this humble class of its useful laborers. We must feel that when the State does its full duty under this amendment there can no longer be a possibility of the interference which offends her dignity and arouses her indignation. Her own independent sense of justice will have righted the wrong, and all this conflict will cease for the future. But without resting on such speculations, but expressing them with entire deference to my State and its courts, I am constrained by my interpretation of the law and Constitution to enter the following order :

At the Circuit Court for the Western District of Virginia, held at Danville, on the 13th day of November, 1878, Burwell and Lee Reynolds, by their counsel, submitted to the court a petition by them presented to the judge of the Circuit Court for the county of Patrick for the removal of the prosecutions against them into this court, which petition is a part of the record which said petitioners have procured of the clerk of said Circuit Court of Patrick, and now offer to file in this court, praying that said prosecutions may be here docketed, and proceeded with here. The court being of opinion that said petitioners have been denied such a trial as is secured to them by the laws of this State by competent jurors, without distinction of race or color, doth direct said causes, upon the petition aforesaid, to be docketed in this court for trial ; and the clerk is hereby authorized to issue forthwith a writ of *habeas corpus cum causa* to the marshal of this district to take the bodies of said defendants into his custody, to be dealt with according to law and the order of this court ; and that the clerk of this court in the vacation thereof direct to the said marshal a writ of *venire facias* for twenty-five jurors, qualified as such by the laws of this State, without the distinction of race or color, to attend on the first day of next term for the trial of said cases at the bar of this court.

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NOTE.—By order of the General Assembly of Virginia, the attorney-general of the State, James G. Field, has filed a petition in the Supreme Court of the United States, praying for a writ of *mandamus* upon Judge Rives, directing him to remand these two prisoners to the sheriff of Patrick, which petition had not been passed upon at the time of the publication of this volume.

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*United States Circuit Court, Western District of Virginia, March Term, 1878, at Lynchburg.*

## CASES OF THE COUNTY JUDGES OF VIRGINIA.

Whether a State officer, empowered by law to select jurors to serve in the courts of the State in the trial of civil and criminal cases, who for a series of years selects only white jurors and fails to select colored jurors, is amenable to indictment in a court of the United States, under section 4 of the act of Congress, approved March 1st, 1875, entitled "An act to protect all citizens in their civil rights."

THE laws of Virginia intrust the whole duty of selecting jurors to serve in the State courts to the judges of the county courts.

An act of the General Assembly of the State, passed in 1870, provides that "*all male citizens, twenty-one years old and not over sixty, who are entitled to vote and hold office under the Constitution and laws of the State, shall be liable to serve as jurors.*"

It is alleged as a fact that in many counties of the State colored men have never been put upon the juries.

The act of Congress of March 1st, 1875, for the protection of the civil rights of all citizens, provides that:

SECTION 2. No citizen, possessing all other qualifications which are or may be prescribed by law, shall be disqualified for service as grand or petit juror in any court of the United States, or of any State, on account of race, color, or previous condition of servitude, and any officer or other person charged with the duty in the selection or summoning of jurors, who shall exclude or fail to summon any citizen

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for the cause aforesaid, shall, on conviction thereof, be deemed guilty of a misdemeanor, and be fined not more than five thousand dollars.

At the March Term of the Circuit Court of the United States for the Western District of Virginia, held at Lynchburg, the grand jury made presentment by indictment of several of the judges of the county courts of counties in the district for violation of the second section of the said act of Congress just quoted.

The indictments were found in pursuance of a charge of the judge of the court, which was as follows :

RIVES, J.—GENTLEMEN OF THE GRAND JURY: I am required by act of Congress to provide for your selection; as nearly as practicable, in conformity with the State law; such is the deference properly paid by Congress to the laws and practice of the States. Hence in the rule of court I have prescribed for the purpose, the lists are returned by the marshal from the various counties appurtenant to this court without discrimination as to race and without reference to politics. The only injunction is to have duly qualified jurors, of sound judgment, and liable to no suspicion of any disaffection to the government or of any disinclination to execute the laws. From these lists you are then drawn by lot, so as to remove all possibility and repel any imputation of your being impanelled for any sinister purpose or for the accomplishment of private ends. With these precautions the court is assured of your impartiality and your ability to assert and vindicate the laws.

You have no sooner taken your oaths, and your seats in the panel, than you are set aside and consecrated to a special and responsible duty, that of inquiring into offences of every description against the laws of the United States. You cannot, then, be approached by any one on the subject of your inquiries, either by verbal or written communications, unless with my leave, and any attempt at such tampering should be promptly reported to the court for its action. The witnesses you may need are fully protected from all intimidation and hindrance, and the officers who are to execute your process are encouraged and shielded by similar guards.

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All this displays the anxiety of the laws to insure you the most ample opportunities of prosecuting your inquiries free from all external pressure, and with exclusive reference to your own sense of duty. Outside opinions and outside influences are not to invade the sacred precincts of your deliberations. Fealty to the laws and intrepid fidelity to your oaths is the motto that should be emblazoned over the door through which you retire, and where none can follow save the district attorney, on whom you can at all times call for the laws, and the witnesses who are to give you the facts. In order to preserve the due sanctity of your deliberations you must be cautious to abstain from all disclosure of your proceedings, and in every respect to observe that secrecy to which you are sworn for obvious ends of justice and dignity.

As to the scope of your inquiries, they are coextensive with the jurisdiction of this court. They cannot go beyond. You are restricted to the statutes of the United States. The warrant for your finding must be found in them.

This results from the nature of our governments, State and Federal. Congress ordains laws to define and protect the operations of the government of the United States within the States. To this end it establishes courts of its own, and intrusts to them the due assertion and enforcement of its laws; every question arising under the Constitution, the laws, and the treaties of the United States are either primarily or mediately referrible to the Federal courts. Hence, if these respective tribunals, State and Federal, keep within their prescribed orbits and discharge their whole duty to the laws of both, there will scarcely be room or occasion for conflict of jurisdiction. But the moment a law of Congress is disobeyed in any judicial quarter, the danger of this collision becomes imminent, and it becomes the duty of all having power to guard against it to take every possible precaution to prevent it.

Under this persuasion and with this view I deem it my duty to call your special attention to a law of Congress designed to secure to all persons "the equal protection of the laws," the denial of which, in a late case in this district, has brought the Circuit Court of the district in conflict with a State court apparently

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to the disquietude of the public. I allude to an act of Congress forbidding under penalties any discrimination on account of race or color to be made by those charged with the duty of returning jury lists.

Before citing it, however, I would beg leave to recall to you the requirements of your State laws and Constitution, not that you have to deal with them on this occasion, but to show you that in the execution of this act of Congress you are not asked to do anything contrary to them, but only what is strictly conformable to them. By the laws of the State no discrimination is made on account of race or color in the liability of its citizens to jury service. All male citizens, twenty-one years of age, not over sixty, who are entitled to vote and hold office under the Constitution and laws of this State, shall be liable to serve as jurors, etc. Code of Virginia, chap. 157, sec. 1, p. 1058. This could not be otherwise, under the State Constitution or the 14th amendment of the United States Constitution.

The former was adopted prior to the ratification of the latter, and it will be seen that the guarantees of the Bill of Rights are quite as strong as the language of this amendment. It is declared as follows, chap. 20: "That all citizens of the State are hereby declared to possess equal civil and political rights and public privileges." Chap. 21: "The declaration of the political rights and privileges of the inhabitants of this State are hereby declared to be a part of the Constitution of this Commonwealth and shall not be violated on any pretence whatever." This, then, is a fundamental provision of your own State Constitution. It was adopted by an overwhelming majority on 6th July, 1869. Following this, on the 8th October of the same year, was the formal ratification of the 14th amendment of the Constitution of the nation. It is in these words: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws." By the concluding

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clause of this amendment Congress has power to enforce its provisions by appropriate legislation. In the exercise of this power Congress has passed sundry laws to maintain this equality of rights, and to redress their violations. Prominent among these acts is the one I now desire to give you in charge. It is the act of March 1st, 1875. It assures to all, without discrimination of race or color, the full and equal enjoyment of the accommodations and privileges of inns, public conveyances, theatres and other places of amusement, and provides exemplary redress for the denial thereof. But it does not stop here; these are the lesser matters of the law which, indeed, it scrupulously guards and protects; but it goes farther, and embraces the great muniment of life and liberty in preserving "*the trial by an impartial jury*," and conforming to the grand "*rescript*" that "no man shall be deprived of his liberty except by the laws of the land or the judgment of his peers." This act, therefore, secures by its fourth clause to the lately enfranchised race the inestimable privilege of having their rights and privileges tried by jurors not subject to the traditional influences and spirit of caste. This is a great practical good, which this law seeks to secure, and, as such, deserves your earnest attention in the inquest with which I now charge you. But it must be admitted its scope is broader. It is well for you to consider its language; it is in these words: "That no citizen, possessing all other qualifications which are or may be prescribed by law, shall be disqualified for service as grand or petit juror in any court of the United States, or of any State, on account of race, color, or previous condition of servitude; and any officer or other person charged with any duty in the selection or summoning of jurors, who shall exclude or fail to summon any citizen for the cause aforesaid, shall, on conviction thereof, be deemed guilty of a misdemeanor, and be fined not more than five thousand dollars."

It so happens that under the State laws the duty of making out and returning jury lists is devolved upon the judges of the county and corporation courts. Code of Virginia, section 3, chapter 157, p. 1059. The act in question has, therefore, to deal with these officers. It is at this point Congress intervenes, and constrains them by penalties to observe these provisions, which have naturally grown out of the 14th amendment. The offence

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thus denounced consists in the exclusion by these officers from their jury lists of qualified citizens because of their race, color, or previous condition of servitude. The motive makes and constitutes the misdemeanor. It may be difficult to prove. It is not given to you to know what passes in the mind of another; but like all unlawful intents the evidence of it may be found in presumptions of fact. When this intent has been declared, or where a demand of a lawful jury without this discrimination has been refused, the offence would be clearly made out, provided you believe the witness to the declaration or denial. But such indubitable proof may not often be expected. You must look to the surrounding circumstances of the case and the overt acts of the parties to fix the intention of the latter in this exclusion. If it should appear to you that such officer has, by a long and unvarying course, refused to put on his lists the names of colored persons duly qualified, you would be compelled to accept this conduct as evidence of his guilt, indict him for the offence, and give him the opportunity to repel these strong presumptions of fact against him. If, on the contrary, it shall appear, that these officers have sometimes listed, or offered to summon when asked, juries without this discrimination of race, you would scarcely be justified to impute this unlawful intent to such occasional omission. It is, in my view, the habitual neglect or the special denial in civil or criminal suits involving the antipathies of race that is aimed at by this act of Congress. I trust it will be sufficient for the ends of public justice that attention should be attracted to this law by your findings. I cannot and do not suspect these officers of obstinate or determined disobedience to law. That may be determined by the future. It is the observance of the law, and not punishment for the violation, that is sought.

But you and I must obey the laws we are sworn to administer. We cannot be deterred from it by clamors or threats, however industriously raised against us. I feel confident you are duly impressed with the sense of your responsibility, and that you cannot and will not shrink from doing your whole duty.

This inquisition has already taken place in the counties pertaining to the courts at Danville; it remains for you now to prosecute it in the counties represented on your panel, leaving the

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grand juries of the other courts to resume it on their respective parts. If it shall be found here, as at Danville, that some obey and others disobey the law, you must needs choose between them; both cannot be right; if you excuse the disobedient you reflect on the obedient; it is your duty to enforce a uniform obedience, and exact a universal respect for the laws.

If this shall be faithfully and fearlessly done throughout my whole district it will arrest future resort to the Federal courts for a denial in this respect of "the equal protection of the laws," and leave the State courts in the full and free exercise of their appropriate jurisdiction. But if this be not done, and a plain duty is evaded under artfully devised and misplaced scruples as to the law, you will be fomenting further disorders and conflicts. I am at a loss to conceive of any motive on the part of honorable and intelligent citizens to undertake in any way to obstruct the great organic measures to which your faith, as a people, is pledged in the most solemn manner, or to thwart the mission of the General Government, in all its departments, to give the equal protection of the laws to all its citizens without distinction.

Before the rebellion it must be conceded that the General Government was felt by our people only in the blessings it dispensed, in the maintenance of commerce and peace with all nations; the encouragement of our industries, productions, and manufactures; in a sound convertible currency, and in admirable postal facilities for all the varied demands of intercourse and business. This was necessarily and in a great measure changed by the war of the rebellion. A heavy debt was incurred in its suppression by arms; that debt fell upon the people of all the States alike, and had to be raised by direct excises. But happily these direct taxes are not like those following the war of 1812, a burden upon property; they now rest upon articles of luxury, and arise from consumption. Those who do not use tobacco or whiskey, nor deal in them, go free of this impost. Nevertheless the necessities of its collection and the protection of these revenues from illicit traffic brings within the States the collector for the sale of stamps to legitimate the traffic, and his deputies to supervise and suppress the violation of these laws. But they do not come among us without ample protection by law against their venality, extortion,

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or corruption ; you will therefore scrutinize this, as well as every other branch of the Federal service in your midst, with the view of detecting and exposing any and every malversation in office. But, at the same time, you will see to it, that these officers are duly protected in their rightful functions. It is not to be tolerated that they should be met and resisted by arms, and exposed to dastardly assassination by bands of defiant offenders. Not only has this resistance gone thus far elsewhere, but the State courts have arrayed themselves against these officers by indicting them for acts of resistance to these marauders, and refusing them a trial in the Federal courts, as ordained by act of Congress. This state of things is insufferable and subversive of government and law. I trust it can never exist in this district. I look to you to denounce all such lawlessness, and to spare no pains to search out these contemners of law and civilization and bring them to this bar for trial and punishment.

In calling your attention thus emphatically to the foregoing offences, I would not have you forget that you have to pass under review, however cursory, all the criminal statutes of the United States. You will find them compiled under title 70 of the Revised Statutes, and are classified under heads respectively of crimes against the existence of the government ; against public justice ; against official misconduct ; and finally against the elective franchise and the civil rights of citizens.

From this title you will see that there is no form of official wrong or corruption that has not been foreseen and provided for by Congress. It is, therefore, largely in your power to maintain the purity and integrity of the Federal service by denouncing all infractions of these laws. Hence, I especially solicit your scrutiny into the conduct of all the Federal agencies within your district, pertaining to the courts, the revenue service, the national banks, and the post-offices. They are all closely allied to the interests of the people ; and all reposing trust in you would like to be certified by you that all these departments are satisfactorily and purely administered. It does not fall to your lot, as much as elsewhere, to take cognizance of illicit distilling. It is, for the most part, restricted to the mountain fastnesses of the district, where it is more apt to escape detection and secure impunity. I

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am sorry to say that this offence has not decreased, as I hoped it would from the number of convictions had and the exemplary punishment inflicted. There seems to be a strange sort of fascination about it, proof against all the pains and penalties of the law. Nevertheless, we are bound to pursue it. The law is too plain; the mischief too manifest; the evil example of impunity too flagrant. We must persevere to the end. The law must not be borne down by continuous violations and persistent defiance.

In conclusion, you need scarcely be assured that the court is ready to exert all its authority to maintain the dignity and promote the success of your deliberations. Its process and its officers are at your call, to enable you to extend your researches; but at the same time I must urge you to all convenient dispatch, and the utmost practicable economy of time and money.

NOTE.—By resolution of the General Assembly of Virginia the attorney-general of the State was instructed to take proper steps to bring the subject of the arrest of the county judges indicted under this charge for review by that court. That court had not passed on this subject when this volume was published.

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*United States District Court, No. 1, District of Maryland, at Baltimore, December Term, 1854.*

CHARLES REEDER, JR., v. THE STEAMSHIP GEORGE'S CREEK.

Liens founded upon the necessities of vessels in foreign ports are never displaced by mortgage-titles recorded in home ports.

LIBEL *in rem* by a materialman for repairs to ship.

This case was argued and submitted to the court upon the following statement of facts:

The steamer George's Creek belongs to the port of New York, and on the 24th of December, 1853, she was mortgaged by her

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owners to Messrs. Knapp & Stacey, of New York, to secure the payment of \$30,000. The said mortgage was duly recorded in the office of the collector of customs at the port of New York, in which office the said steamer was enrolled, and also in the office of the register of conveyances for the city of New York. Under the control and in the employment of her owners she made frequent trips to the port of Baltimore, and while here during the last summer certain repairs were made to her by the libellant at the request and by the direction of her captain, which repairs were necessary and proper to enable her to complete her voyage, and the prices charged for such repairs are at the usual and ordinary rates. This libel was filed on the 18th of October, 1854, and the steamer was taken under the process of this court, and released on stipulation. On the 16th of September, 1854, a bill was filed in the Superior Court of the City of New York by Messrs. Knapp & Stacey, to obtain a decree for the sale of said steamer for the payment of the said mortgage-debt, and on the 17th of October, 1854, a decree was passed for the sale of the said vessel, under which decree she has been sold in New York, since she returned; and the proceeds of sale were not sufficient to pay the said mortgage-claim.

GILES, J.—No question has been raised in the argument of this case in reference to the conflict of jurisdiction, but the court understands that to be waived, and the opinion of the court to be invoked, and the case to be put upon the question, “Whether as against a prior mortgage of a vessel belonging to another State recorded according to the provisions of the act of Congress of 29th of July, 1850, a materialman has a lien on the vessel for necessary supplies and repairs?” No decision upon this point has been cited to the court by either of the counsel, and the court has not been able, after diligent search, to find any. It is then a new question for the decision of the court, and must depend upon the construction which the court may give to the said act of 1850.

It is admitted in the argument of this case, that prior to the passage of the said act of Congress materialmen had such a lien for repairs and supplies to a vessel belonging to another State which could be enforced in this court, and which no mortgage or

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sale of said vessel by the owners could interfere with or defeat. This arose from two principles of the general maritime law: 1st. Every contract of the master within the scope of his authority as master in reference to the vessel, binds the vessel; and 2d. A materialman who repairs or furnishes supplies to a ship obtains thereby, without any express contract to that effect, a lien on the ship for remuneration. The Supreme Court, however, in the case of *The General Smith*, 4 Wheaton, 438, has restricted this last principle to the cases of foreign ships or ships in the ports of a State to which they do not belong. These principles were established by the general maritime law for wise and beneficial purposes. Ships, the subjects of them, were frequently in necessity of repairs and supplies in distant portions of the world where their owners were unknown, or without credit, and to enable them to pursue their voyages such a lien of which I have spoken became a necessity of the commercial world; and this, without any reference to the condition of their title at home. Nor does the act of 1850 do anything more than make bills of sale and mortgages of vessels, when recorded, as valid and good against all persons as they were before against the grantees and mortgagees, and all persons who had notice of them.

Clearly before this act, whether a materialman had notice of a prior mortgage or not, it did not affect his lien. The mortgagee was only personally responsible for supplies and repairs, when in possession or in receipt of the profits of the voyage. But the materialman suffers no detriment from having no claim upon the mortgagee. His original remedy remains to him. He may proceed against the mortgagor *in personam* or against the ship *in rem*. Now this is the law as laid down by Flanders in his late most excellent work on shipping, a work published some three years after the passage of the act of 1850, and which act is given in one of the notes appended to said work. Certainly this intelligent writer did not consider the act of 1850 as changing the law in this particular. And I find the same general principle recognized without any exception in the first volume of Curtis's Commentaries on the Jurisdiction and Practice of the United States Courts, section 51, a work which went to press in August last, more than four years after the passage of the act of 1850.

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In the case of *Weaver v. The S. G. Owens*, decided by Judge Grier in 1849, and reported in 1 Wallace's Reports, 368, that learned judge remarks, "that no seizure by Buck under his supposed legal title as mortgagee would defeat or supersede any liens obtained by the libellants (who were materialmen) or others against the ship while in the possession of the Townsends." This was a case where the vessel had been sold by Buck to the Townsends, a part of the purchase-money only paid, and in the conveyance it was provided that if the balance of the purchase-money was not paid, the Townsends were to forfeit all claim of ownership on the vessel, "and the registry was not changed." The supplies were furnished while the ship was in the possession of the Townsends under this conditional sale. And in further illustration of this principle and of the reasons on which it rests, I will read a passage from the court's opinion in the case of *Cole v. The Atlantic*, to be found in Crabbe's Reports, 442:

The lien now sought to be enforced is given to the mechanic who furnishes work or materials to a vessel in a foreign port, which are necessary for the prosecution of her voyage. The policy of the law, as well as the principles of justice, regards this claim with high favor; and it does so, not more for the security of the mechanic than for the general interests of commerce and the particular interests of the shipowner. A vessel bound on a distant voyage with a valuable cargo meets with a disaster which prevents her proceeding with safety, although in itself it may not be of much account, and may be repaired at a small expense. She puts into a port where her owner has neither funds or credit, and unless the repairs can be made the voyage will be broken up, and both vessel and cargo exposed to a ruinous diminution of value. In this situation the law says to the mechanic, release this vessel from her distress, save her owner from this loss, and the vessel herself, wherever she goes, shall be security for your payment. There is some generosity in the confidence thus given to strangers, because it is not without considerable hazard. The vessel may be lost; her owner may be distant or insolvent; the mechanic, nevertheless, permits her to go; and the law will not suffer such a claim to be defeated on slight grounds, but will be astute to prevent it.

But the learned proctor for the claimants in this case contends that the proviso at the close of the 1st section of the act of 1850 makes the recorded mortgage prevail over every other lien, ex-

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cept that created by bottomry bond. Now can this be so, and, if so, would it not be most impolitic and unjust? A materialman who repairs a vessel or furnishes supplies to her in a foreign port, without a bottomry bond, gets only the usual interest on his bill, and has to follow the vessel frequently to her home port to recover his claim; and although her owners are liable to him *in personam*, if the vessel is lost on the voyage he has lost his principal security. But if he refuses to furnish the supplies or to lend money to repair without a bottomry bill, he gets a heavy rate of interest, sometimes as high as thirty per cent., if the vessel reaches her home port. And a bottomry bill, too, is only valid where the supplies furnished or money loaned were necessary to enable the vessel to prosecute her voyage. Now did Congress mean to draw a distinction between these two liens, and to give to the one possessing the smaller claim to our favor the greater efficacy? I think not, but that it was only intended by the act of 1850 to give recorded bills of sale or mortgages of vessels priority over every subsequent conveyance of them made by those in possession of them, and over any rights acquired in them by general creditors by judgment and execution; and that it was not intended to interfere with those liens in favor of materialmen given by the general maritime law. Such a construction of the act is in accordance with the equitable principles which prevail in the maritime law, and enter so largely into the adjudications of the admiralty courts; for all repairs and supplies to vessels in a foreign port are directly for the benefit of the mortgagee, by enabling the vessel to prosecute her voyage, and return to her home port where she can be in reach of process to enforce his lien, and, by her return, adds to the means of the mortgagor to liquidate his mortgage-debt. Entertaining these views, I will sign a decree for the claim of the libellant with interest and costs. And as this is a new question, and twenty-six other cases now pending in this court have been entered to abide the decision of this case, I have reduced my opinion to writing, and will file it in the case.

Since preparing my opinion in this case, I have been referred to a recent decision in the District Court for Massachusetts as reported in the *Boston Daily Advertiser* of January 11th,

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in which Judge Sprague decides that "liens founded on the necessities of vessels abroad are never displaced by mortgage titles." See *The Granite State*, 1 Sprague, 277.

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*United States District Court, Eastern District of Virginia, at Alexandria, October 3d, 1879.*

ELLIS v. THE STEAMTUG KATY WISE.

Where a steamtug running free with the current and tide, down a river in a deep channel two hundred and fifty yards wide, at the rate of eight miles an hour, in a fog, fails, within a distance of thirty to sixty yards, to avoid collision with another tug, having six vessels in tow, coming up the stream, at the rate of two miles an hour:

*Held*, That the tug which was running free was at fault in moving with such speed and such want of caution as to have failed to clear the approaching vessels, and that the plea of inevitable accident was inadmissible.

IN admiralty. Libel for damages by a collision which happened in the Potomac River, on the 30th of April, 1879, in the middle of the channel above Hatton's Point, abreast of Tenth Landing, on the line of latitude  $38^{\circ} 44'$ . [See sheet No. 4, United States Coast Survey, Chart of Potomac River.]

The steamtug Kate was steaming up the Potomac River on the morning of April 30th, 1879, having six vessels in tow, four of them upon a tow line, and two of them lashed upon her bows; the schooner Martha Washington upon her port bow, and the schooner Lynnhaven upon her starboard. The tide was in ebb and going out at the rate of about three miles an hour. The tug was making about four and a half or five miles through the water, or about two miles or less over the ground. She was in or near the middle of the channel, which is two hundred and fifty to three hundred yards wide and upwards of thirty feet deep. The channel from Hatton's Point to Alexandria is nearly straight. There was a thick fog; but the tops of trees could be seen upon the bank, the light at Alexandria was distinct, and large objects

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Statement of the case.

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were visible at a distance of forty to sixty yards. The tug sounded her fog-whistle diligently as she proceeded. There were proper lights upon the Kate, but not upon the vessels in tow.

About five o'clock in the morning, when she was abreast of Tenth Landing, she heard the fog-signal of a vessel meeting her. She blew one long whistle as a signal to pass to the right, and heard no answering signal. She ported her helm and slowed her engine, which changed her course from due N. to N. by E. She very soon saw an approaching steamtug (which proved to be the Katy Wise), at a distance not less than thirty yards off. (The testimony varied between thirty and sixty yards.) This vessel did not seem to port her helm but came on in the contrary direction, and soon ran into the port bow of the schooner Martha Washington, cutting into and disabling her, so that she had to be supported from sinking and tugged to the flats of Georgetown, where she now lies abandoned and nearly or quite valueless. The libel is brought by Ellis, the owner and master of the Martha Washington, for the damages thus occasioned.

As to the Katy Wise, the testimony of her master was, that she was coming down the channel free, moving over the ground at the speed of eight or nine miles with the tide; that she blew fog-signals as required by the regulations; that her course was S. by E.; that when he first heard the fog-signal of the Kate, that vessel was on his starboard bow; that the Katy Wise ported her helm, to pass to the right, and at the same time slowed down and reversed her engine; that the manœuvre proved ineffectual; that the Martha Washington *ran into her*; and that the collision was the result of inevitable accident. There was conflict of testimony as to when the Katy Wise reversed her engine, some of the witnesses saying that it was just after the collision, but the master, Graham, stating positively that it was before that event.

*Messrs. S. F. Beach and J. M. Johnson appeared for the libellant.*

*Mr. G. A. Mushbach, for the claimant.*

The decision of the court was as follows:

HUGHES, J.—This collision happened in a broad, deep, straight channel, much frequented, accurately surveyed and charted, well known, and within a few miles of the ports of Alexandria, Washington city, and Georgetown. It occurred in broad daylight, an hour after daybreak. There was a thick fog, but not a very dense one. Otherwise there was no *vis major*, and the collision ought not to have happened. If this collision was inevitable, then a total interdict would have to be put upon the navigation of the great river Potomac during every one of the frequent fogs that come over it. Undoubtedly the collision was not through inevitable accident; it occurred through fault; and the question is, Where was the fault?

Much was said in the evidence and the argument about the want of regulation lights on the Martha Washington and the other vessels in tow of the Kate. But the libel, the answer, and the testimony concur in stating that the collision happened at five o'clock in the morning, and on the 30th of April. The almanac shows that this was just three minutes before sunrise, and was consequently nearly an hour after daylight. As the regulations do not require lights to be kept up in daylight, I dismiss that subject from consideration.

My own conclusion concurs with the statement of Captain Graham, master of the Katy Wise, who was at the wheel at the time, as to the manner in which the collision occurred. The Katy Wise was coming down the river with the tide at the rate of eight miles an hour. On hearing the Kate's fog-signal, or certainly on coming in sight of her, which was from thirty to sixty yards off, he ported his helm in compliance with the Eighteenth (American) Rule of Navigation. But he did not content himself with that manœuvre, which would, in a distance of thirty to sixty yards, have certainly turned his prow to the right, and cleared the approaching vessels; the momentum of the Katy Wise and the propelling force of the engine giving effect to the movement of the rudder. But he did more. He did just what paralyzed the action of the rudder. He stopped his engine; indeed, his own testimony is that he reversed it. This additional

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action neutralized that designed to be secured by porting his helm; and the tug losing its impulsion forward, could obtain no help from the rudder to change its course; while the rudder, caught by the tide, bore the prow of the vessel to the left instead of the right, and helped to insure, if it did not cause, the collision which ensued. This is Captain Graham's own explanation of the manner in which the collision occurred.

If this case depended upon Rule Eighteen, the Katy Wise was in fault; not, indeed, by omitting to port her helm as required, but in doing what was not required by that rule, and what defeated its purpose; that is to say, in stopping and probably reversing the engine, which the rule implies must be kept in action.

I say if this case turned upon Rule Eighteen the Katy Wise was in fault in doing what was not required by that rule, and what defeated its purpose. The rule not only requires that the helm shall be ported but *ported effectually*.

There is another rule of navigation which might be claimed to govern this case, if the fog was not dense, the accident having occurred in the daytime. Though the rule is not in the schedule of statutory regulations, it is nevertheless universally recognized by mariners, especially among navigators of rivers. Where a vessel moving down with the current meets a vessel coming up, the vessel moving slowest is less bound to precaution than the other. *Waring v. Clarke*, 5 Howard, 502; *The Chester*, 3 Haggard's Ad. 316. It is a universal rule that where a vessel incumbered with tows, or otherwise deprived of capacity to manœuvre at will, is met by a vessel having no vessels in tow and moving free as to wind and tide, the vessel moving free must keep out of the way of the vessel incumbered and trammelled. Especially is this the case when a steamer is approaching a tug and her tows. *The Syracuse*, 9 Wallace, 676, and cases there cited.

But while the two principles thus referred to undoubtedly bear upon the case at bar, I do not think that they entirely control it. I think that the public interests require that I should base my decision in the present case upon a principle of more direct importance to the navigation of the Potomac River, liable as that river is to the frequent recurrence of such fogs as that

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Syllabus.

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which prevailed on the morning of this collision. I hold that the Katy Wise was in fault in moving in such a manner, as to speed and incaution down the river on that morning, that she could not be diverted from colliding with a vessel which she was meeting, and which she saw, at a distance of thirty or sixty yards. This collision happened in consequence of the fact that the Katy Wise did not, within that distance of thirty to sixty yards, pass far enough to the right to avoid running into the Martha Washington. If she is to be excused for doing so on the score of inevitable accident, then it will be unsafe hereafter for vessels to move at all in the Potomac River during such fogs as that not extraordinary one which prevailed on the morning of the 30th of April last. A steamer moving in a fog is required by law to go at such a moderate rate of speed as will place her headway under such easy and ready command that she can be stopped within any distance within which other vessels may be seen by her lookout; and, going at a greater rate of speed than this, is a fault on her part. *The Calonado*, 1 Brown's Ad. 406; *McCready v. Goldsmith*, 18 Howard, 89; *The Bridgeport*, 7 Blatchford, 365; *The Pennsylvania*, 9 Blatchford, 451, and numerous other cases.

The event proved that the Katy Wise was moving without the caution required by law, and was in fault therein.

I will sign a decree of condemnation, and referring it to the commissioner to make report of the amount of damages sustained by the libellant.

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*United States Circuit Court, Eastern District of Virginia, at  
Norfolk, August, 1879.*

THE UNITED STATES v. GEORGE M. BAIN, JR., ET AL.

The town of Gosport was sold to private purchasers by the State of Virginia, according to a plat of lots and streets. The streets were at right angles with the Elizabeth River, and terminated on the river. The law of Virginia gives title to riparian owners as far as low-water mark. It authorizes

## Statement of the case.

riparian owners to extend wharves from the land to the channel, provided navigation be not thereby obstructed. The United States became subsequent purchaser from a private owner, of one of the lots of land in Gosport, bordering on Elizabeth River, and built a wharf out from its own lot, and from an adjoining lot, to the channel. One of the streets of Gosport (which is part of the town of Portsmouth) is called Randolph Street. The lot of the United States bordered on this street from a foot or a few feet above high-water mark to low-water mark, and the Government's wharf is in front of its lot and on a line with the side of Randolph Street.

The Legislature of Virginia, by special act, authorized the town of Portsmouth to lease out the space between the end of Randolph Street to the channel of Elizabeth River, for the purpose of a dock, which license was exercised by the town by a lease to defendants, and a dock was made which brings deep water from the channel to the street, and extends along the side of the wharf of the United States.

This dock, being private property, is sometimes closed by its proprietors by a chain boom, and the United States is thereby sometimes prevented from using the *side* of its wharf, and confined to the use of its *front*.

A bill was filed on behalf of the United States by the United States attorney, praying for an order of injunction, restraining the proprietors of the dock from obstructing the United States in the use by its vessels of the *side* of its wharf. The question being on the validity of the act of the Legislature of Virginia authorizing the lease to private persons of the space occupied by the dock,

*Held*, That the State had power to authorize such a lease, that the lease was valid, and that the bill must be dismissed.

*L. L. Lewis, United States Attorney, for the United States.*

*W. W. Old, for the defendants.*

IN chancery.

The bill complains of the defendants' dock in front of Randolph Street, in Gosport, as an obstruction of a highway, and prays for an appropriate restraining order.

Before the year 1792 the site of the town of Gosport (now a part of the city of Portsmouth) was a common belonging to the State of Virginia. In that year the Legislature directed the site to be laid off for a town, according to the present plan of streets and lots, and the lots to be sold. Amongst other lots sold by the treasurer of Virginia, on the occasion, was the one now owned by the United States, and mentioned in its bill of complaint in

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Statement of the case.

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this cause, which is in the use of its lighthouse establishment as a depository for buoys and materials and implements of the lighthouse service.

Nothing is said in the act of the General Assembly of Virginia, directing the sale of lots in Gosport, about water privileges; nor do the deeds by which these lots were conveyed make mention of such privileges. The lots were described by their numbers as laid down on the general plat of the town, and the purchasers took title, as implied by the lots being sold by numbers, in the plat of a proposed town. Some of them, and amongst others this lot of the United States, mentioned in the bill of complaint, fronted on Elizabeth River.

The deed from the State to the original purchaser of this lot is not in evidence. The deed to the United States, made in 1870, gives the following boundaries: "Beginning at a point on the south side of Randolph Street, 106 feet 4 inches eastwardly of the east side of Water Street; from thence running southwardly, and parallel with Water Street, 67 feet 4 inches; thence westwardly, parallel with Randolph Street, 106 feet 4 inches to the east side of Water Street; thence southwardly along the east side of Water Street 80 feet 8 inches; thence eastwardly, and parallel with Randolph Street, to the Elizabeth River; thence northwardly along Elizabeth River 148 feet to Randolph Street; thence westwardly, and along the south side of Randolph Street, to the beginning."

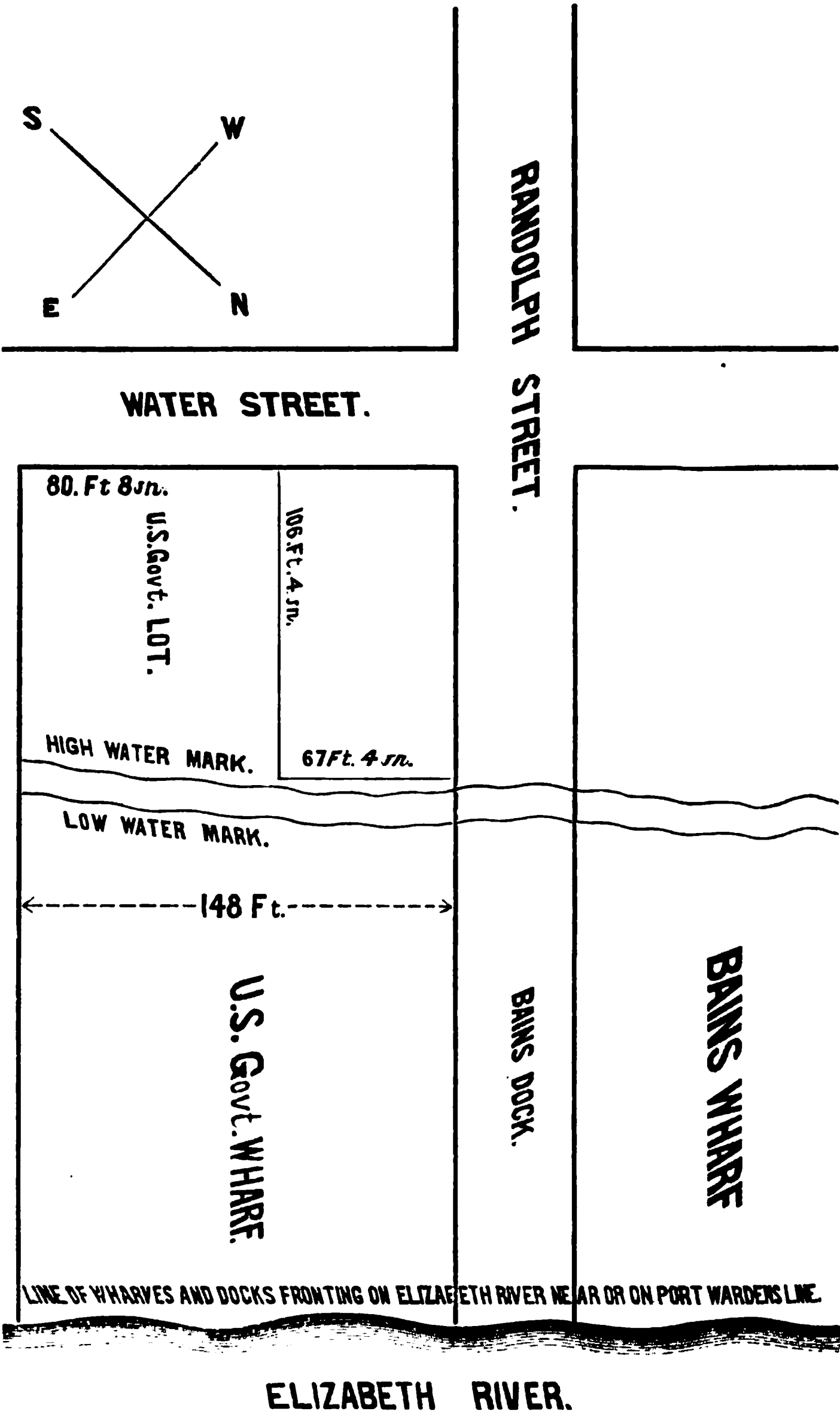
We may presume that all the deeds, through which this title has come to the United States, have used like terms of description.

It would seem from these terms that the fee in half the streets did not pass to lotholders abutting on them, nor anything but an easement in them.

The following is a plan of the lot as thus described in the deed, and as extended by a wharf from the shore to, or near to, the port warden's line in Elizabeth River.

It will be observed that the description of the lot, by boundaries, in the deed, does not give the depth of the lot measuring from Water Street to Elizabeth River. It does not, by any terms,

Plan of the lot.



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express or implied, convey title further than to the shore of Elizabeth River.

The title of a riparian owner, on the tide-waters of Virginia, extends to low-water mark ; subject, however, as to the space between high and low water mark, to the *jus publicum* of all the people of the State, who are allowed, by law, the privilege of fishing, hunting, and fowling on this space, and on the shores and beds of these tide-waters. See sections 1 and 2, of chapter 62, of the Code of Virginia. This space, and these beds and shores, are subject, also, of course, to the usual public right of navigation.

But it is provided by section 59, of chapter 52, of the Code, that any owner of riparian land may extend a wharf into the water as far as desired, provided that navigation be not obstructed, nor the private rights of other persons impaired. As to the cities of Norfolk and Portsmouth, it is provided by a law of the State, passed February 18th, 1875, that "the harbor commissioners of these cities shall have full power to regulate and define the port warden's line along the water-front of the two cities, and the Elizabeth River and branches thereof, for five miles above and below the limits of the said cities ; that they shall have power to fix the lines along said rivers within which riparian owners may erect wharves, docks, and other proper erections and fixtures for commercial and manufacturing purposes ; that they shall have authority to cause the removal of any wharf, dock, wreck, or other obstruction to navigation, or that may, in their opinion, be injurious to the harbor, at the expense of the owner or owners, or the parties causing the obstructions ; *provided*, that the right of any owner or owners of wharves, whose lines have heretofore been fixed by authority of State legislation, are in no wise to be disturbed." It does not appear in evidence that the harbor commissioners have ever objected to the action of the defendants in this cause, either in constructing or managing their dock at the end of Randolph Street. Their rights accrued before the passage of the law.

The United States has extended a wharf from its lot as described, out into the river to, or nearly to, the port warden's line, as marked in the above plat. This extension is about 170 to 175

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feet beyond the natural shore. It will be seen from this plat that the lot of the United States, considered as bounded by low-water mark, abuts very little, if any at all, on Randolph Street; indeed, the bill of complaint alleges that "at the time the said lot of land was purchased by the United States, so much of Randolph Street as forms a portion of the boundary of the said lot was covered by mud and water, and that that portion of it was afterwards dredged out by them." In fact this portion was under water and wholly below low-water mark.

In 1871 the Legislature of Virginia, by special act, authorized the city of Portsmouth, which includes the town of Gosport, "to lease out for a term of years, to private parties or corporations, 'the ends of the streets running to Elizabeth River,' " with certain exceptions. By "ends of streets" is meant the space in front of streets, extending from low-water mark out into the river to the front line of the docks and wharves, which is usually the port warden's line.

On June 28th, 1875, Bain & Bro. petitioned the council of Portsmouth for a lease of the ends of certain streets in Gosport, adjoining lots of theirs, for a term of twenty-five years; stating that their object was to open docks wider than the streets, by encroaching upon their own property, and of sufficient depth of water to admit large ships to come in and load in them; expressing the belief that "the proposed improvement would redound to the advantage of the city commercially and financially." By deed, which embodied this petition, the city of Portsmouth did make the lease of the ends of Randolph and one or two other streets to Bain & Bro. at a certain annual rent, for twenty-five years; and Bain & Bro. say, in their answer in this cause, that they "have converted the end of Randolph Street into a dock with water twenty-two and eighteen feet deep, so that ships and vessels of large draft may lie at ease in it; and that it has been made so by dredging it out at their own cost and expense, the space having been previously covered with water, though not deep."

The Bains made a sub-lease of this dock to O. O. Vandenberg, one of the defendants in this suit, who is a purchaser of timber for shipment to Europe, and who uses this dock, and a wharf and shed of the Bains contiguous to it, for the purpose of mooring

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logs and storing lumber preparatory to shipment abroad. Vandenberg occasionally confines his logs in the dock by means of a boom chain stretched across its mouth. This boom, during the periods when thus stretched, prevents the vessels of the lighthouse establishment from entering the dock, and confines them to the front of the wharf of the Government. Vandenberg is willing to lend, and has proffered the key of the chain buoy to the officers of the Government, so that they may at all times enter the dock and lay alongside of the Government wharf; but these officers object to the chain and logs as a nuisance, and the Government brings this bill to restrain Vandenberg and Bain & Bro. from further obstructing the use of the dock, which the bill claims to be a street and highway. Before the lease was made by Portsmouth to Bain & Bro., the United States had expended about \$1300 in dredging along the side of its wharf in this dock. They made this expenditure without securing any right which might arise from so doing, either from Portsmouth or Virginia.

The bill charges that the defendants are obstructing, and that they often entirely close, by means of logs and other impediments, the entrance to Randolph Street from the Elizabeth River, so that it cannot be used by the United States and the general public for the purposes for which the said street was acquired and established. The bill complains that the said pretended lease from the city council of Portsmouth is utterly invalid; that the authorities of the said city had no power or authority to make or enter into the same; and that no interest inconsistent with the rights of the United States and the general public to use the said street as a common highway was acquired under the same, and that no interest inconsistent with such rights was acquired by the said Vandenberg by virtue of the pretended lease to him.

The defendants, in their answer, allege, among other things, that the whole of said Randolph Street upon which the lot of the complainant abuts, is now, and always has been, so far as they know, covered with water and mud, and no street for the passage of men on foot, or beast of burden or vehicles, has ever in fact existed in that part of the shore designated as Randolph Street, which forms the boundary of the complainant's lot, either as

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alleged in the said bill or as laid down on said plat filed therewith; and that at present the whole of the space laid down as Randolph Street, on which the complainant's lot abuts, is a dock with water twenty-two and eighteen feet deep in it, and the defendants insist generally that the riparian rights of complainant are confined to the *front* of their lot and do not extend to the side of it.

The following is the opinion of the court delivered by

HUGHES, J.—The principal question of fact in the case is whether Randolph Street extends farther than low-water mark. It may be conceded that the owner of lots adjoining the streets in Gosport derived from the State of Virginia the right of easement in them, and that the State could not in good faith take away that right except for some important public purpose. But it is quite clear that this claim upon the State belongs only to the owners of lots which abut on the streets. Does, then, the lot of the United States abut on Randolph Street? A street is a way upon land, more properly a paved way, lined or proposed to be lined by houses on each side. It is confined to land, and ends on the shore or bank of the land at the border of the water. The deeds from Virginia to owners of lots in Gosport impliedly warranted the free use of the streets laid down on the plat of the town, and did not warrant the use of water, or land under water below low-water mark. When, therefore, the bill of complaint itself alleges that the portion of Randolph Street bordering upon the lot and wharf of the United States was covered by mud and water, it admits that the street terminated as a street at Neville's north line, and does not reach to the lot of the United States.

We have, therefore, in this inquiry nothing to do with a *street*; nothing to do with "Randolph Street" as an easement of the lot mentioned; which, as the bill virtually alleges, ceased to be a street when reaching this lot. This being so, it follows that the deed of Virginia to the purchaser through whom the United States derives title, contained no warranty of an easement in Randolph Street as a street; and the State has violated no contract in its act allowing Portsmouth to lease out "the end of Randolph Street."

The United States attorney seems to feel the stress of this view of the subject, and employs the term *highway* much more frequently than *street* in his argument. He thereby shifts the question into one, whether the owner of the Government lot has any right to the use of a *water-way* in front of Randolph Street.

Notwithstanding what has been said, I think the deed implies that the lot contains a strip of land between Neville's lot and low-water mark. (See plat, p. 596.) This strip is merely imaginary, if the language which has been quoted from the deed is true.

If there be such a strip in fact, however, it is a very narrow one; and it is only the end of this very narrow strip abutting on the end of Randolph Street which can give to the owner of the lot any special right in Randolph Street, and in the supposed water-way in front of that street. The right in the street is not taken away by the lease to the defendants. It is only the right in the water fronting the street that is taken away; and this deprivation is the matter really complained of in the bill. But there is no warranty of the water-way expressed or implied in the deeds; and the right of the complainants in the water in front of Randolph Street is only the *jus publicum* spoken of in the books, which is the right of the public to use the public waters of rivers and bays in commerce and trade, to pass and repass freely over them, and to enjoy the advantage from them which the public generally may do, as distinguished from that which is private, special, and proprietary. This is the right which is taken away by the action of Virginia and Portsmouth in the lease in question; and the proposition of the United States attorney, in his learned and elaborate brief, is, that a State of this Union has no power to take away the right of the public to the general free use of public waters, in the manner stated.

If the proposition be true, the United States has itself violated the *jus publicum* by building its wharf in front of its lot, for the distance of some 175 feet out from low-water mark into the Elizabeth River, which is a public highway between two commercial cities.

The United States owns the lot in question only by private tenure, and is before this court only in the character of a private corporation. It has built its wharf in front of its lot out into

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the river, either in violation of that *jus publicum*, upon the sanctity of which it insists in its bill, or else under the authority of a law of Virginia,—section 59, chapter 52 of the Code of Virginia. If the State had no power to authorize riparian owners to build wharves and bulkheads in rivers washing their lands in prejudice of the *jus publicum*, then the United States, as owner of its wharf, is here in the character of a wrongdoer, asking the abatement of an obstruction to its free use of a dock as owners of an adjoining wharf which it had no right to construct. If its proposition is true, it must itself go out of court as a trespasser without warrant of law upon the *jus publicum* in Elizabeth River.

But the proposition is not true. Whatever decisions may be found here and there, denying in special cases the power of the States of the Union over their highways and public waters, the overwhelming preponderance of authority is in favor of this power. True that this power is qualified by two provisions of the National Constitution, one of which forbids a State from passing any law impairing the obligation of contracts, and another of which gives to Congress the right of regulating commerce and trade between the States. With these restrictions, it is easy to show that the power exists.

In *Willson v. The Blackbird Creek Marsh Company*, 2 Peters, 245, the State of Delaware had authorized a company to construct a dam across the mouth of a navigable stream for the purpose, by shutting off the tides, of reclaiming a large body of marsh lands. The owner of a sail-vessel broke down the dam, and the company sued him for damages. The plea stated that the creek was navigable, in the nature of a highway, in which the tide ebbed and flowed, and denied the right of the State to authorize its closure by a dam. The case went to the Supreme Court of the United States, and that court, Chief Justice Marshall delivering its opinion, pronounced the law of the State to be valid. The court said of this law of Delaware, “unless it come in conflict with the Constitution or a law of the United States, it is an affair between the government of Delaware and its citizens, of which this court can take no cognizance.” An examination of the decision will show that it admits, as a proposition not needing argument, that the State had power to close a navigable water

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in its discretion, and that this power could not be questioned unless it was exercised in conflict with some positive act of Congress passed in pursuance of its power "to regulate commerce with foreign nations and between the States."

In the case of *Pennsylvania v. Wheeling Bridge Company*, 13 How. 518, the State of Virginia had authorized the city of Wheeling to build a bridge across the Ohio River, and Congress had passed laws regulating commerce and the running of steamboats upon that river. The city of Wheeling was building this bridge, which was charged to be an obstruction to navigation, and the judgment of the court upon a vast body of evidence taken on that point was, that the bridge would, in point of fact, be an obstruction to the navigation. The case was before the court twice. At its first hearing it decided the bridge to be an obstruction, and forbade the building of it. The court in its last decision, speaking of the first one, says :

The bridge had been constructed under an act of the Legislature of Virginia ; and *it was admitted that the act conferred full authority upon the defendants for the erection*, subject only to the power of Congress in the regulation of commerce. It was claimed, however, that Congress had acted upon the subject, and had regulated the navigation of the Ohio River, and had thereby secured to the public by virtue of its authority the free and unobstructed use of the same ; and that the erection of a bridge, so far as it interfered with the enjoyment of this use, was inconsistent with and in violation of the acts of Congress, and destructive of the right derived under them ; and that, to the extent of this interference with the free navigation of the river, the act of the Legislature of Virginia afforded no authority or justification.

It was in conflict with the acts of Congress, which were the paramount law. This being the view of the case taken by a majority of the court, they found no difficulty in arriving at the conclusion that the obstruction of the navigation of the river, by the bridge, was a violation of the right secured to the public by the Constitution of the United States and laws of Congress, nor in applying the appropriate remedy in behalf of the plaintiffs.

The bridge had been completed before the first decision was rendered. Immediately upon its delivery steps were taken, which soon proved successful, for procuring from Congress an act declaring the bridge a post road, and authorizing its owners to have and maintain it at the height at which it stood when con-

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demned by the Supreme Court. The bridge was soon afterwards blown off by a hurricane, and an injunction was obtained from one of the justices of the Supreme Court forbidding its owners to rebuild it at the original height. It was built, nevertheless, in contempt of this order; and when the bill of injunction came on for regular hearing the Supreme Court, notwithstanding the contempt, receded from its former judgment, on the ground that Congress had legalized the bridge, and dismissed the bill.

The Supreme Court proceeded in both cases upon the "admission that the act of the Legislature of Virginia conferred full authority upon the owners of the bridge for its erection, subject only to the power of Congress in the regulation of commerce."

In the case of *Martin v. Waddell*, 16 Peters, 367, the court said (at page 410), through Chief Justice Taney: "When the Revolution took place the people of each State became themselves sovereign, and in that character hold *the absolute right* to all their navigable waters, and the soils under them, for their common use, subject only to the rights since surrendered by the Constitution to the General Government."

In *Pollard's Lessee v. Hogan*, 3 Howard, 230, the Supreme Court said: "The right of eminent domain over the shores and the soil under navigable waters, *for all municipal purposes*, belongs *exclusively* to the States within their respective territorial jurisdiction, and they, and they only, have the constitutional power to exercise it. But in the hands of the States this power can never be used so as to affect the exercise of any national right of eminent domain or jurisdiction with which the United States have been invested by Congress."

In *Gibbons v. Ogden*, 9 Wheaton, 1, the Supreme Court say: "Inspection laws form a portion of that immense mass of legislation which embraces everything within the territory of a State not surrendered to the General Government, all which can be most advantageously exercised by the States themselves. Inspection laws, quarantine laws, health laws of every description, as well as laws for regulating the internal commerce of a State, and those which respect turnpike roads, ferries, etc., are component parts of this mass."

In *Gilman v. Philadelphia*, 3 Wallace, 713, the power of the

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State of Pennsylvania to authorize the construction of a bridge across the Schuylkill River near its mouth, which would entirely prevent its navigation by a large class of vessels, was passed upon. It was held that an act of the State Legislature giving the right to build the bridge, notwithstanding such effect, was valid.

In *Conway v. Taylor's Executors*, 1 Black, 603, the Legislature of Kentucky had granted to a person owning the entire shore abreast of Newport, on the Ohio River, the exclusive right to land ferry-boats, plying across the Ohio River, on that shore. This right was assailed as contrary to the common right of landing there, and as a monopoly, and the act of the Kentucky Legislature was attacked as exceeding the powers of a legislature of a State. But the Supreme Court of the United States said: "Rights of commerce give no authority to their possessor to invade the rights of property . . . . He cannot invade the ferry franchise of another without authority from the holder. The vitality of such a franchise lies in its exclusiveness. The moment the right becomes common the franchise ceases to exist. It is property, and rests upon the same principle which lies at the foundation of all other property. . . . There has now been three-quarters of a century of practical interpretation of the Constitution. During all that time, as before the Constitution had its birth, the States have exercised the power to establish and regulate ferries; Congress never. We have sought in vain for an act of Congress which involves the exercise of this power. That the authority lies within the scope of 'that immense mass' of undelegated powers which 'are reserved to the States respectively,' we think too clear to admit of doubt." See also *Fanning v. Gregorie*, 16 How. 534. Such is the uniform tenor of all the utterances of the Supreme Court on this subject, in cases too numerous to be cited here.

Similar decisions have been rendered by the United States Circuit Courts. In *Spooner v. McConnell et al.*, 1 McLean, 337, where the Ohio Legislature had chartered a canal company, with the usual powers, and the company was about to obstruct the navigation of the Maumee River by constructing a dam in aid of the canal, the court held that the act allowing this proceeding

## Opinion of the court.

was within the power of the State; and this, notwithstanding an express provision of the Ordinance of 1787, that the navigable waters of the Northwestern Territory shall be "common highways and forever free." The same was held in *Palmer v. Cuyahoga County*, 3 McLean, 226.

In the case of *The Passaic Bridges*, Appendix to 3 Wallace, 782, the State of New Jersey had authorized certain railroad bridges to be constructed over the Passaic River which entirely obstructed its navigation by a large class of vessels, very seriously impairing the commerce of Newark. The validity of the act was assailed in a bill praying for an injunction to restrain the railroad company from erecting the bridges. Judge Grier dismissed the bill, saying, in the course of his opinion, "whether a bridge over the Passaic will injuriously affect the harbor of Newark, is a question which the people of New Jersey can best determine, and have a right to determine, for themselves. If the bridge be an inconvenience to sloops and schooners navigating their port, it is no more so to others than to them. I see no reason why the State of New Jersey, in the exercise of her *absolute sovereignty over the river*, may not stop it up altogether, and establish the harbor and wharves of Newark at the mouth of the river."

There have been quite recent cases, involving the same principle, in the Supreme Court of the United States. In *United States v. Fox*, 1 Otto, 367, that court says:

It is an established principle of law everywhere recognized, arising from the necessity of the case, that the disposition of immovable property, whether by deed, descent, or any other modes, is exclusively subject to the government within whose jurisdiction the property is situated. *McCormick v. Sullivan*, 10 Wheaton, 202. The power of the State in this respect follows from her *sovereignty within her limits, as to all matters* over which jurisdiction has not been expressly or by necessary implication transferred to the General Government.

Fox had devised his property to the United States to aid in paying off the National debt. The law of New York prohibited devises except to natural persons. The Supreme Court held that the State law must prevail, and that the United States could not take the property devised. See *Kohl et al. v. United States*, 1

Otto, 367. See also Judge Sutherland's opinion in *People v. Kerr*, 37 Barbour, at p. 412, where that learned judge, after an elaborate review of the authorities, concludes with this language:

It may be stated as a well-settled American doctrine, that the State legislatures have unlimited power over public rights in a highway, and can obstruct, modify, impair, or extinguish them, as to any highway or portion of a highway, except so far as the State power is qualified by the commercial clause of the Constitution of the United States, without making any compensation to individuals for resulting or consequential damages.

In the light of these authorities can there be any doubt of the power of the State of Virginia to authorize the lease of the space between the ends of the streets of Portsmouth and the navigable channel, to men of enterprise and capital willing to undertake the expense of constructing spacious docks capable of floating the great ships of commerce?

The space between the land and the channels of streams needs either to be wharfed or docked to fit them for commerce. Either the water must be deepened by docks, up to the land, or else the land must be extended, by wharves, to the water channel. The United States did the latter with its lot at Gosport by warrant of a general State law. The defendants here did the former by warrant of a special State law. It was competent for the State to pass either law, having "absolute sovereignty over the river," and "the exclusive power over the shores of her navigable streams and the soil under their waters."

This question has been so conclusively settled by the Federal courts of the United States that it would be a useless task to examine the decisions of the State and of the English courts upon it. Those of a few of the States have undoubtedly denied this power, and there are many English decisions which deny a similar power to the king. See for example *Attorney-General v. Parmenter et al.*, 10 Price, 411. But no English decisions can be found which deny to Parliament the absolute power over this subject; and those State courts which have denied it to State legislatures have followed the English precedents which refer only to the king rather than to those which refer to the Parliament.

## Opinion of the court.

There was a time when the Crown could grant away to the subject the royal demesnes and landed possessions at pleasure; but now by statute of 1 Anne, chapter 7, section 5, such royal grants are prohibited, and the Crown lands cannot be so aliened. So much, therefore, of the seashore as has not been actually aliened by grant, and bestowed on lords of manors and other subjects, still remains vested in the Crown incapable of alienation. Hall's Seashore, p. 106. But where the Crown has acted under the authority of Parliament, it may part with them.—*Edulgee Byramjee, ex parte*, 5 Moore, Privy Council Cases, 294.

The leading case on this latter point is *King v. Smith*, Douglass, 441, decided by Lord Mansfield. The law has been finally settled in England as to the power of Parliament, in *Attorney-General v. Chambers*, 4 De Gex, McN. and Gordon, 206; *Gann v. Free Fishers of Whitestable*, 1 House of Lords Cases, 192; and *Duke of Buccleuch v. Metropolitan Board of Works*, L. R., 5 Exchequer, 221. A very instructive case is *Railroad Company v. Stevens*, 10 Am. Law Reg. (N. S.), 165; and in Virginia, *Palmer & Kellog v. Tazewell*, 25 Grat. 786. See also *Rundle v. Raritan and Delaware Canal Company*, 14 Howard, 80. In dealing with the case at bar, I am bound by the decisions of the Supreme Court of the United States, and, following them, I must hold that the law of the State authorizing the leasing of the end of Randolph Street was valid; that the defendants were fully empowered to construct a dock there, and entitled to the exclusive control of it; and are not committing a nuisance in using and controlling it, in the absence of objections by the harbor commissioners.

Even if all this were not so, the principle is well settled that acts authorized by law are not nuisances such as equity can relieve against, and on that principle the bill would not lie, and the complainant must be left to his remedy at common law. See *People v. Kerr*, 37 Barbour, N. Y. R. 418; *Georgetown v. Alexandria*, 12 Pet. 98; *Crowder v. Ficklin*, 19 Ves. 619.

Whatever harm results from acts authorized by law is *damnum abseque injuria*. See Weeks on DAMNUM ABSEQUI INJURIA, section 48 and cases there cited, viz., *Trustees v. Utica*, 6 Barb. 313; *Hatch v. Vermont*, 2 Williams, 142; *Stoughton v. State*, 5 Wis. 291; *Commonwealth v. Reed*, 34 Pennsylvania, 275; *Hinchman v. Patterson*, 2 Green, 75; *Samuels v. Mayor*, 3 Sneed, 298;

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Statement of the case.

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*Delaware v. Commonwealth*, 60 Pennsylvania, 367; *Williams v. New York*, 18 Barb. 222 (but see same case, 16 N. Y. 97); *Saltonstall v. Banker*, 8 Gray, 195; *Mazetti v. New York*, 3 E. D. Smith, 98; *Hartwell v. Armstrong*, 19 Barb. 166; *Hodgkinson v. Long Island*, 4 Edw. Ch. 411; and *Parsons v. Travis*, 1 Duer, 439.

As well, therefore, on the question of jurisdiction as on the merits, the bill must be dismissed.

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*United States District Court, Eastern District of Virginia, at Richmond, October, 1877.*

## IN RE C. L. RADWAY, BANKRUPT.

Where the State law allows the homestead exemption (with certain exceptions) against any levy by execution founded upon "any demand for any debt contracted" by the head of a family:

*Held*, That the exemption is good against judgments founded upon *tort*, both principal and costs.

*Held, also*, That the removal of a bankrupt out of the State after his adjudication in bankruptcy, does not defeat his right to the homestead.

## IN bankruptcy.

On the 16th day of May, 1877, C. L. Radway, being a resident of Richmond, engaged in business, a householder, and the head of a family, was sued by one James Mitchell for the seduction of his daughter Laura, and on May 18th he was sued by said Mitchell for an insult to his daughter Lucy. Radway being then temporarily absent from the State, attachments were forthwith issued against him as an absconding debtor, and executed on the above dates in respective suits, upon, among others, one George A. Ainslie, who had in his possession two certain notes, executed by one J. N. Wilkinson, in part payment of the purchase-money of a house bought by said Wilkinson from said Radway, each dated February 5th, 1877; one payable sixteen months after date for \$1698.42, and the other twenty-eight months after date for \$1847.18, and held by Ainslie as collateral security to indemnify him from loss as his bail in a criminal proceeding growing out of these charges. Pending these suits and before judgments were

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Brief of bankrupt's counsel.

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rendered, Radway, in conformity with the 4th section of chapter 183 of the Code of Virginia of 1873, claimed the benefit of the homestead exemption in the notes referred to, in the hands of Ainslie, by filing of record a homestead deed dated on the 12th day of June, 1877. In the meantime Ainslie, holder, and Wilkinson, maker, appeared before the court, and admitted their liability, and on the 19th day of June, 1877, judgment was rendered in the first of the suits in favor of the plaintiff against Radway for \$2500, with interest from date, and \$31.64 costs; and on the following day Radway confessed judgment in favor of the plaintiff in the other suits for \$500, with interest from date, and \$19.08 costs; and, in consideration of the acceptance thereof by the plaintiff, he released all errors of record in the other suit. Upon these judgments executions were issued June 23d, 1877, and were received by the sheriff on the 25th of the same month, returnable first Monday in August, 1877.

On the 30th day of June, 1877, Radway filed his petition in bankruptcy and was duly adjudicated a bankrupt, and upon the foregoing state of facts applied by petition for a homestead exemption in the notes referred to. The subject was referred to the register, who reported in favor of the validity of the homestead exemption against the judgment, not only as to the principal of the judgments, but also the costs, and in favor of the allowance of the exemption to the bankrupt, notwithstanding the objection that he had ceased to be a resident of the State.

This report was excepted to as contrary to the law and the facts by the plaintiffs in the two judgments rendered.

*Brief for the Bankrupt. James Caskie, and W. W. Henry, counsel.*

The first question to be considered in this case is the one raised by the Mitchells in their answer, that "the claims which they assert against said Radway are of such a nature that said Radway cannot claim a homestead as against them. The execution under which respondents claim is not issued on any demand for any debt contracted by said Radway. It is only as to such demands that the homestead law applies. The essence of this suit is that it is for a tort, and it is in no sense a demand for a debt con-

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Brief of bankrupt's counsel.

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tracted." We will first direct our attention to the above construction placed upon the homestead law of this State, for the reason that if the foregoing views are sustained, it will be unnecessary to consider the other question presented in said answer. The language of our statute is that "every householder or head of a family shall be entitled . . . to hold exempt from levy, seizure, garnisheeing, etc., issued on any demand for *any debt* heretofore or hereafter contracted, his real and personal property," etc. Code of Virginia, section 1, p. 1168. What is the meaning of the word "debt" in this section? The general and usual signification of the word is an obligation to pay money, no matter how that obligation arose. The object and aim of all homestead laws are to afford protection to the debtor and family from the demands of creditors, and therefore we are compelled to think that the word "debt" as above used must be used in its broadest and most comprehensive sense, and not in the narrow sense which the respondents in this case apply it. We are sustained in maintaining the position that we have taken, that the word "debt" as used in section 1, chapter 183, Code of Virginia, is to be taken in its broadest sense by the language of section 7, article 11, p. 99, of the Constitution of this State, this being the article of the Constitution by virtue of which the Legislature enacted the homestead law. The language of that section is as follows: "The provisions of this article shall be construed *liberally*, to the end that all the intents thereof may be fully and perfectly carried out." Code of Virginia, p. 99. Again, in looking over the exceptions enumerated in our statute, as against which the homestead exemption does not operate, we fail to find that the judgments of the respondents in this case are embraced in any of said exceptions. Another strong ground for our construction of the word "*debt*," and which is particularly applicable to the case at bar, is to be found in a late decision of our Court of Appeals. The learned judge who delivered the opinion, in speaking of the policy which has dictated homestead exemptions, said it was "a policy suggested by considerations both of a political and a benevolent character. . . . Benevolent, because the possession of the homestead is the security of the family against the improvidence, the follies, and the *imprudences* of the father

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Brief of bankrupt's counsel.

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or husband." *Hattorf v. Wellford, Judge*, 27 Grattan, 361-2. We have found a case reported from Wisconsin in which the question was whether the homestead of a judgment debtor is liable to sale, where the judgment was rendered in an action of tort; in this case it was decided that the homestead of the debtor was not liable to the satisfaction of such judgment, though the statute of the State used the words "debt" and "contracted." The opinion of the court was that "although there may be a technical distinction between 'debt' and 'damages,' still the word 'debt' itself is commonly and generally used to describe all obligations to pay money, whether arising from contract or imposed *by law as a compensation for injuries*." And in this general sense the word was evidently used in this (Wisconsin) statute, and the word "contracted" does not mean founded upon a contract, but it was used in its more general sense as equivalent to "incurred." *Smith v. Ouram*, 17 Wisconsin, 406; 44 Ill. 451; 66 N. C. 206. We also insist that the judgments of the respondents are debts founded upon contracts, as used in our homestead statute, because a judgment is an express contract of record. Blackstone says they are contracts of the highest nature. 2 Blackstone Comm., 465; 1 Story on Cont. sec. 2. This rests on the principle that the law implies a promise by every one to ratify whatever the law of the land orders or directs him to pay. "A great many of human transactions depend upon implied contracts which are not written, but grow out of the acts of the parties." *Ogden v. Saunders*, 12 Wheaton, 341. The bankrupt having committed a tort upon the persons of the Mitchells, respondents, the law implies a contract on the part of the bankrupt to pay the damages resulting from the committal of the tort. As soon, therefore, as that damage is ascertained it becomes a debt founded upon a contract.

Hoping that we have sustained our position that a judgment founded upon a tort does not operate so as to deprive the householder or head of a family of his homestead exemption, we will now consider another question raised in respondents' answer, that the bankrupt was not, on the 16th day of May, 1877, the date of the attachments issued against his property upon the institution of suits against him by the Mitchells, respondents, and is not now, a resident of this State, but was, and is, in fact, a resi-

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Brief of bankrupt's counsel.

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dent of Texas. Upon these questions, Register T. S. Atkins, by direction of the court, has taken evidence, the only witnesses being those summoned by the Mitchells, respondents. These depositions conclusively show that the bankrupt was not at the time of the issuing of said attachments nor is he now a resident of Texas. The bankrupt states in his testimony that in February, 1877, he went to Texas for the purpose of seeing the country, but that he had never decided to leave this State and settle there. It must be borne in mind that this visit of the bankrupt was nearly three months before he was arrested on the criminal charge of seduction, and more than three months before the attachments were issued against his estate at the instance of the Mitchells. He was, at that time, the agent in this State for the Wheeler & Wilson Manufacturing Company, which agency he did not resign until his arrest on charge of seduction, and only then because he thought the charges against him were of such a nature as to make it desirable that he should resign. In answer to a question from his own counsel he stated that he had never positively decided to leave this State. In response to a question as to his future intention, he said that if he got his exemptions he thought he would go into business here, but if he did not get them he did not know what he would do. Mr. G. A. Ainslie, a witness summoned by the respondents, stated that he had had frequent business relations with the bankrupt, and that, so far as he knows, the bankrupt had never left or intended to leave the State. Mr. Robert Alvis, the other witness examined upon this subject, testified to the same effect. There has not been a particle of evidence adduced to show that the bankrupt purchased or proposed to purchase any property in the State of Texas. The testimony shows that his family were here during his visit to Texas, and are at the present time in this city. The bankrupt also testifies that about two years ago he went to California to see if he liked the country, and whether he could better his condition by settling there, but that he decided to remain in Virginia. We call attention to the fact that the copies of attachment issued against the estate of the bankrupt in the Mitchell suits, and which are filed in the respondents' answer as exhibits "A" and "B," are attachments issued against the bankrupt, not as a non-resident, but

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Brief of bankrupt's counsel.

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as a resident about to leave the State. Our law provides for the issuing of attachments against the estate of non-residents, and also against the estate of residents about to leave the State. The respondents chose to issue their attachments against the estate of the bankrupt as a resident about to leave the State, showing conclusively that at that time they believed him to be a resident of the State. The charge which they make in their answer that he was and is a non-resident was an afterthought, to the substantiation of which there is no evidence. To constitute a person a non-resident he must have left the State *sine animo revertendi*. 37 Ill. 73; 25 Ill. 221; 39 Ill. 590; 6 Allen, 510; 8 Allen, 576; 14 Allen, 1; 47 N. H. 46; 12 Ohio St. 431. As to what may be the intention of the bankrupt for the future, though he has signified his intention of remaining here, we insist it is not in the province of the court to inquire. In deciding whether the bankrupt is entitled to the homestead exemption the court has only to determine whether or not he was, at the time of the filing of his petition praying to be adjudicated a bankrupt, and is now, a resident. The evidence conclusively sustain the affirmative of this proposition. Certainly a trip to Texas five months before bankruptcy, made for the purpose of seeing the country, the family of the bankrupt being all the time in this State, the bankrupt holding at the time the office of agent of the Wheeler & Wilson Manufacturing Company, and his bankruptcy never dreamt of during the visit, cannot be considered to be a change of residence. "If the debtor has a family, his residence is where they reside, although he may make temporary sojourn in another State." *Stiles v. Lay*, 9 Ala. 795.

Now, as to the right of the bankrupt to claim his homestead exemption as against the Mitchell attachments and judgments. By the act of March 3d, 1873, amendatory of the Bankrupt Act, it is provided that

There shall be exempted to the bankrupt such property as is exempted from levy and sale upon execution or other process, or order of any court by the laws of the State in which the bankrupt has his domicile at the time of the commencement of the proceedings in bankruptcy, to an amount allowed by the Constitution and laws of each State as existing in the year 1871, and such exemption shall be

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Brief of bankrupt's counsel.

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valid against debts contracted before the adoption and passage of such State Constitution and laws [this part of the act has been declared unconstitutional], as well as those contracted after the same, and against liens by judgment or decree of any State court, any decision of any such court rendered since the adoption and passage of such Constitution and laws to the contrary notwithstanding.

By virtue of this law, then, all bankrupts who have been adjudicated such since the passage of the act of the Legislature of Virginia, passed June 27th, 1870, commonly known as the Homestead Act, are to be allowed the exemption provided therein against all claims of creditors created subsequent to its passage. The notes which were attached in the hands of G. A. Ainslie as garnishee, and out of which the bankrupt claimed his homestead prior to the judgments rendered against him in the Mitchell suits, are made by the same chapter of the Code under which the attachments were issued proper subjects for the operation of the homestead exemption, even though the said notes were in the possession of the garnishee. After the garnishee has appeared and acknowledged his indebtedness to the judgment debtor, the statute provides that:

The court may order him to pay the amount so found due by him, etc., . . . provided that the judgment debtor may claim that the amount so found due from the garnishee shall be exempt from the payment of the debt to the judgment creditor; and if it shall appear that the said judgment debtor has not claimed and held as exempt the amount of his homestead in other property or thing, then the court shall not render a judgment for the amount so found due in favor of the judgment creditor, except it be for the excess of the same over and above the homestead exemption. Chap. 148, sec. 17, pp. 1013, 1014, Code of Virginia.

The costs mentioned in respondents' answer are plaintiff's costs, and therefore do not affect the bankrupt's homestead exemption, as he was the defendant in the suits in which they were incurred. The Mitchell respondents have utterly failed to substantiate the charges made in their answer that the bankrupt has made away with his estate with intent to hinder, delay, and defraud the respondents, that he refused to be assessed for taxes as a resident of Virginia, that he bought a farm in Texas, that the

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Brief of bankrupt's counsel.

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surety on his bail bond in the criminal prosecution demanded the notes as collateral, because he knew that the bankrupt had changed his residence, and he, the surety, was apprehensive that he would not return, or that the bankrupt ever represented himself as a resident of Texas. The evidence taken conclusively proves to the contrary.

The only remaining point asserted by the respondents' answer which now remains to be considered is, that if it should be decided that the bankrupt is entitled to a homestead exemption in the notes or any other property, even then he has but a usufruct therein, which when exhausted leaves the property subject to respondents' judgments, and that the bankrupt cannot be permitted in any event to touch or handle said property until he has given bond and security conditioned to pay over to respondents respectively their due proportion thereof when his homestead right therein is ended, and that if he is not able to give bond and security conditioned as above then that the homestead exemption be invested in an interest-bearing fund, and he be permitted to receive the interest so long as his homestead claim exists.

The counsel for respondents has informed us that in support of his usufruct proposition he refers to the decision of the Chancery Court of the City of Richmond in the case of *Richardson v. Butler*, reported in February number (1877) of *Virginia Law Journal*, which decision is based for the most part on the case of *Black v. Curran*, 14 Wallace, 469. This last-mentioned case is from the State of Illinois, the statutes of which, relating to homesteads, enact:

Sec. 1. There shall be exempt from levy and forced sale, under any process or order from any court in this State for debts contracted, *the lot of ground and buildings thereon, occupied as a residence and owned by the debtor*, being a householder, etc. Such exemption shall continue after the death of such householder for the benefit of the widow and family continuing to *occupy* such homestead until the youngest child, etc.

Under this law the Supreme Court of the United States decide that the homestead right cannot, in an absolute sense, be said to be an estate in the land. The statutes of this State in relation to

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Brief of bankrupt's counsel.

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homesteads so materially differ from those of Illinois that a decision under the laws of the latter State cannot be considered as authoritative upon the laws of this State. The 1st section of our homestead act reads as follows :

Every householder or head of a family shall, as provided for by the Constitution, be entitled . . . *to hold* exempt from levy, seizure, etc., . . . his real and personal property or either, including money and debts due him . . . to the value of not exceeding \$2000 to be selected by him.—Chap. 183, sec. 1, pp. 1168, 1169, Code of Virginia.

It will be seen at once that *occupation* of the land and buildings thereon which is essential to the right of homestead in Illinois is not at all essential with us. Our law gives the householder a homestead to the amount of \$2000 in any kind of property which he may have with no conditions of occupancy. Under the statutes of this State an estate of homestead is an estate of freehold. It is a species of estate not known to the common law, but it seems to have all the incidents of a freehold estate, and to come within the definition given by elementary writers. 1 Bl. Com., book 2, chap. vii, p. 72. It is an estate indeterminate in its duration. Even in Massachusetts, where *occupancy* is one of the essentials for the right of claiming a homestead, the homestead right is regarded as an estate, and the Supreme Court of that State have gone so far in treating the homestead right as an estate as to say that although a homestead cannot be acquired except by a householder having a family, yet when once acquired and still occupied by him it has been held not to be defeated or lost by the death or absence of his wife and children. *Doyle v. Coburn*, 6 Allen, 73; 12 Allen, 34. Chief Justice Waite, in speaking of the interest of the householder in his homestead exemption, says :

The object was to give the householder *full power and control* over his property ; to permit him to use it in such manner as in his judgment would best promote the interest of himself and family, and, if he had not by some voluntary act of his own deprived himself of the right, to allow him to select and hold a certain specified amount, not description of property, free from the process of law to enforce the payment of his debts.—*In re Solomon*, 2 Hughes, 164, and S. C., 10 National Bankrupt Reg. Reports, p. 13.

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Brief of Mr. John S. Wise.

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This decision was made in this circuit, and therefore should have great weight in the consideration of this case. That the bankrupt is entitled to his \$500 exemption we suppose will not be denied, and we, therefore, hope it will be given him out of such of his property out of which he has not claimed the homestead exemption.

*Brief of Mr. John S. Wise, for the creditors opposing the exemption.*

By the terms of our Constitution and laws, from motives of public policy and humanity, exemptions are made. They are of two classes. One class of exemptions was made by law, without any constitutional requirement; the other is pursuant to constitutional requirement, "in addition to the articles now exempt," as the Constitution expresses it. I propose to look at those two exemption laws, their language, their reason, their spirit, etc.

In the year 1866 an act was passed by the Virginia Legislature as follows: "In case of a husband, parent, or other person who is a housekeeper and head of a family, there shall be *exempt from distress or levy* the following articles," etc. Under this, the family bible, pictures, books, a pew in church, cemetery lot, wearing apparel, beds, stoves, a cow, horse, household articles, farming utensils, sewing machine, etc. Code 1873, p. 476. This law was merely a re-enactment of the laws which had existed from the beginning of our government. It was founded on the necessities of society—not only on Christian charity, which forbade any creature in the community from being stripped absolutely and left to starve, but from a public policy opposed to having paupers left as a charge upon the public; for every humane government ought to support its paupers. Our lawmakers knew this. They knew that a certain modicum of property was absolutely necessary to the meanest mortal in the community who was head of a family, and who owned it. Wherefore, recognizing this, they passed a law declaring, as above, that such should be "exempt from distress or levy." There could be no question as to the policy or language of this law. The policy was plain, the language plainer,—"*exempt from distress or levy*,"—the largest words of their kind, embracing

every class of judicial seizure, unqualified by any conjunctive phrase. The unfortunate debtor, the derelict tenant, the seducer, the slanderer, the blackguard—none were too unfortunate, none too bad to be entitled to exemption from *distress or levy* to the above extent. The reasons for this exemption are too obvious for argument. That it is good as against any *levy* is too plain for argument. That the provision is just is equally apparent. When the framers of our Constitution began their labors they had the above exemption law before them. By reference to the Journal of Debates of that convention it will be seen that Charles H. Porter, a New Yorker, presented the draft of the proposed homestead. By reference to the Acts of Assembly of New York (Laws of New York of 1850, p. 499, ch. 260), it will be seen that the New York law reads: "In addition to the property now exempt by law from sale under execution, there shall be exempt by law from sale on execution for debts hereafter contracted," etc. By reference to the decisions of New York it will be seen that long before our convention acted the meaning of the above language had been construed by the courts of New York as follows: "The homestead exemption act does not contemplate the exemption of a homestead from sale on execution issued under judgment for cause of action sounding in tort." *Lathrop v. Singer*, 39 Barb. 396. So that when our convention passed its homestead provision it not only had before it an exemption law of its own which exempted certain articles from *all levies*; it not only had the New York statute, the language of which had been construed as exempting from debts contracted, *not from debts in tort*, but it had the statutes of other States before it which had been construed as giving a homestead good against torts. Thus, for example, the Wisconsin statutes then in existence read (Revised Statutes Wisconsin, 1849, ch. 102, sec. 51, etc.): "A homestead . . . shall not be subjected to forced sale on execution or any other final process from a court, for any debt or *liability* contracted," etc. And that statute, as well as the Illinois statute, had been followed by others, giving the wife such an interest in the homestead that she acquired a joint estate. The Legislatures of those States had declared it to be the purpose of the statutes to prevent any alienation or change

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Brief of Mr. John S. Wise.

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of any kind upon the homestead save by the joint act of the husband and wife. As a consequence these statutes, so different in their language and in their frame from the New York statute, had been construed by the courts of Wisconsin and Illinois. The Wisconsin statute was held to give a homestead as against a tort on the ground that "the word '*liability*,' used in conjunction with the word debt, is broad enough to include all claims, whether founded on tort or contract," and on the further ground that the statute "intends to protect the family of the debtor as well as himself, and he is prohibited even from alienating without the wife's consent." *Smith v. Omans*, 17 Wis. 394. And in Illinois, construing the statute of that State, which reads: "From levy and forced sale, under any process or order . . . . for *debts contracted*," etc., the claim being on a slander judgment, the Court of Appeals said pointblank that the case *did not fall within the terms above quoted*, but relied on a law of 1857, subsequently passed, the like of which is neither in New York nor Virginia, to justify their judgment. I refer to *Conroy v. Sullivan*, 44 Illinois R., in which case it was said: "It is true this case does not fall within the actual terms of the homestead act of 1851 (quoting it as above). The judgment in this case was not strictly a 'debt contracted,' but the law of 1857 declared it to be the object of the Legislature *to prevent the alienation of the homestead in any case, except by the consent of the wife.*" *Loomis v. Gerson*, 62 Ill. 11.

At the time of this constitutional exemption, the meaning of such words as were used had also been construed in Georgia. By a law of 1851 (Cobb's Digest of Laws of Georgia of 1851, 389), "Every white citizen of this State, male or female, being the head of a family, shall be entitled to own, hold, and possess, free and exempt from levy and sale by virtue of any judgment, order, or decree of any court of law or equity in this State, founded on any contracts made after the 1st of May next, or any process emanating from the same," twenty acres of land, etc. In *Davis v. Henson*, 29 Georgia, 345, the exemption was declared to apply only to judgments founded on contract, and not to those founded on torts.

Now, not only were these various decisions before our framers,

but in Pennsylvania it had been decided (*Kenyon v. Gould*, 61 Pa. 292): "No exemption under an execution on judgment in action *ex delicto* is allowable to the defendant under Pennsylvania act of April 9th, 1849,"—an act using words identical with the New York act. See also *Commonwealth v. Dougherty*, 8 Phil. 366.

These were the lights before the framers of our Constitution when they acted, for neither the law nor the decision in North Carolina were then in existence. With such laws and such decisions before them, they proceeded at the instance of a New Yorker to enact a law as follows: "Every householder or head of a family shall be entitled, in addition to the articles now exempt from levy or distress for rent, to hold exempt from levy, seizure, garnisheeing, or sale under any execution, order, or other process issued on any demand for any debt heretofore or hereafter contracted," etc. Constitution of Virginia, art. 11, sec. 1. Was that law framed on the Wisconsin, the Illinois, or the New York statute? Let us compare them:

*Wisconsin*.—A homestead "shall not be subject to forced sale on execution or any other final process from a court for any debt or *liability*," etc.

*Illinois*.—"From levy and forced sale under any process or order . . . . for debts contracted," etc. Speaking of slander, the Court of Appeals says: "It is true this case does not fall within the actual terms of the act of 44 Ill. 451, 62 Ill. 11, and invokes another statute to aid it,"—such as we have not.

*New York*.—"In addition to the (property) now exempt (by law) from sale (under execution) (there shall be) exempt by law from sale on execution for debts hereafter contracted," etc.

*Virginia*.—. . . . "In addition to the (articles) now exempt from (levy or distress for rent) (to hold) exempt from (levy, seizure, garnisheeing, or) sale, under any execution (order or other process issued on any demand) for (any) debt (heretofore or) hereafter contracted," etc.

Can there be any doubt that the New York statute was before the draftsman of that law? Can there be any doubt that our law uses the same guarded language as the New York statute? Can we presume that when as to the poor debtor's exemption our lawmakers gave an exemption against *all levies*, and used the restricted language above set out as to homestead claim-

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ants, they were ignorant of the restricted interpretations placed on the statute they were copying? I think not. The mind of any sensible man must have been drawn to the difference in language between the two enactments. In *Schonton v. Kilmer*, 8 Howard's Practice Reports, 527, this very distinction had been pointed out. The learned judge there refers to the difference of the language used in the New York statute in exempting the few household articles *from levy under any execution*, and that of the homestead law restricting the exemption to *executions for debts contracted*. *Lathrop v. Singer*, 39 Barb. 399. "There is no language to be found in the act indicating an intention to exempt from sale any property on judgments except for *debts contracted*. If the intention had been to extend the exemption to sales under all judgments recovered, it would have been quite easy to have expressed it, and it is most likely if that had been the intention that it would have been so expressed in the act. The omission to do so, and the limitations in words to debts contracted, afford pregnant evidence that the Legislature did not intend to extend its operation beyond the case expressed."

If this reasoning was good as to the New York legislation, it seems to me tenfold strong as to the Virginia legislation framed on this statute, and in the full glare of these interpretative decisions.

That our statute is not framed on the Wisconsin statute is palpable from the omission of the word "liability." That it is not analogous either to the Wisconsin or Illinois statutes in the joint interest it creates in the wife, seems settled by the decision of the Chief Justice in the *Solomon Case*, 2 Hughes, 164. For whereas in both those States it has been expressly pronounced that nothing but the joint act of husband and wife could affect the homestead, whether it be in tort or contract; whereas the homestead in those States has been adjudged thus: "He cannot deprive them of the right to it without the consent of the wife, either by his contracts or torts. In the light of both these laws (*i. e.*, original homestead law and the act of 1857, declaring it to be the object of the Legislature to prevent alienation of the homestead in any case, except by the consent of the wife), the Supreme Courts held it was the evident intent of

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the Legislature to protect the homestead as a shelter for the wife and children, independently of any act of the husband." The learned Chief Justice, like the Supreme Courts of New York, Pennsylvania, and Georgia, has viewed our statute in quite a different light. In the *Solomon Case*, Chief Justice Waite construes our statute thus: "The Constitution grants the exemption as a privilege to the householder." "It declares that he shall be entitled to hold property to be selected by him." "The privilege, so far as it is given by the Constitution, is personal to the householder. The language is 'to be selected *by him*.' . . . If he can waive at all, it seems to us it follows necessarily that for a good consideration he may make a contract to waive such as the courts will enforce." . . . "It was to remain entirely under his personal control, to be dealt with in such manner as he saw fit."\* The result of this decision is, that our statute is nothing whatever like those of Wisconsin and Illinois, for any husband here, by giving notes with homestead waiver, can deprive his wife of her last dollar of homestead. The law permits him, without one syllable with her, to beggar her by his contracts; he may raise money on homestead waiving notes, wallow in drunkenness, reek in debauchery before her eyes. With the proceeds of his notes the creditor may drive her and her helpless children out—that voluntary creditor, who chose to trust him, knowing what misery would ensue. Yet it is pretended that while his wife is at the mercy of a brute's *contracts*, made with a *voluntary creditor*,—it may be against her tears and protests,—an *involuntary victim* of the husband's tort has no redress because of the wife's rights. If this be law, God help the victim. The logic of the law is the license of the libertine. I may be a seducer, a slanderer; I may beat, maim, and debauch with impunity; I may insult the law, and wrong my neighbor, and violate every domestic tie and oath with impunity, for, when called on to pay, I invoke the shield of the law and the sanctity of the hearthstone as good against my

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\* Our own Court of Appeals has also sustained this view by a decision rendered since this argument was written, to wit: Virginia Law Journal, February, 1878, *Read v. Union Bank, etc.*, p. 77; *Whiteacre, Sheriff, v. Rector and Wife*, p. 104.

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torts. Not for the benefit of the community, for that I despise. Not for the benefit of my wife, for her I have wronged; but for the benefit of myself. For after pleading her claim against my torts, I can take the last penny of it independent of her and my victims, by homestead waiving notes superior to both the claims, with the proceeds of which to pursue my debaucheries.

It is argued that, because certain classes of claims are excepted from the operations of the homestead exemption, therefore all claims not specified, of whatsoever character, are barred. The answer to that is very simple. As the claims against which the homestead is declared good are all declared to be demands for "debts . . . contracted," so the exceptions specified are confined to the class of liabilities which sound in contract. Read the exceptions: 1st. Purchase-money; 2d. Laborer's services; 3d. Fiduciaries; 4th. Taxes, etc.; 5th. Rent; 6th. Taxable fees. Every one sounding in contract. Is it possible that *no tort* was held by our lawgivers as entitled to the dignity of laborer's services or officer's fees? Is it possible that if I seduce the daughter of a clerk, in whose court I have a case, he can recover his clerk's fees out of my homestead, but not the damages done to his family or his honor? Is it possible that while the law protects my wife from the "imprudence" of my being a seducer, it does not protect her from my imprudence in running up an immense bill of officer's fees in fruitless litigation? Is it possible that if I seduce my servant girl, she can claim her wages out of my homestead, but not the damages for her loss of virtue? If this be law, then it is an outrage and a mockery. Yet the construction, based on the argument from these exceptions, leads to these absurd results.

The language of our Court of Appeals is quoted in which it is said that the law springs from reasons "benevolent, because the possession of the homestead is the security of the family against the improvidence, the follies, and the *imprudences* of the father or husband." The word *imprudences* is doubtless thought to apply to torts. Those familiar with the rugged Anglo-Saxon of our Court of Appeals well know that it does not use such term as "follies or imprudences" in referring to injuries, wrongs, or crimes. If that court were referring to seduction or to lewd insult, it would not characterize them as "follies or imprudences." Follies and impru-

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dences in business may be very proper subjects for the homestead to operate upon, but to assume that the words "execution issued on any *demand for any debt contracted*," means, in effect, "execution on any demand for liabilities incurred," is not only to presume the convention ignorant of the statute they copied and its construction, and that it used different language in the two exemption laws without meaning differently, but is to import a sense different from the ordinary acceptance of the words used; to import words and statutes which are lacking, and which were confessedly essential to the construction given the Illinois and Wisconsin laws.

The concluding section of the law, which calls for a liberal construction, is invoked. Be it so. But liberality does not mean license. No liberality can justify the interpolation of words not used, or make an execution, issued "on a demand for a debt contracted" one issued "on a demand for a liability for a tort." As was said by Chief Justice Pearson, in his dissenting opinion in the case of *Dellinger v. Tweed*, 66 N. C. 214, "Such a construction not only makes the remedy greater than the mischief, but instead of providing a home and subsistence for unfortunate debtors, grants impunity to wilful wrongdoers."

It is not only an impunity to the wrongdoer, for in nine cases out of ten it takes away the civil remedy of the injured party entirely; but thereby destroys the civil remedy of the injured parties, and depriving them of any other mode of redress, provokes a breach of the peace. There is no public punishment provided for such wrongs. If the homestead right be upheld as against them, there is no private mode of redress, and violence and breach of the peace is invited. It is not like the case of contract. No one is obliged, unless he chooses, to trust any one hereafter so as to become his creditor by contract; but how can a man prevent slander or seduction if he has no mode of recovering damages? We have no public remedy for such; and, in the absence of such, I cannot believe the Constitution intended to put every one at the mercy of the vicious and ill-disposed.

It is no answer to these overwhelming reasons to plead the vicarious sufferings of the wife and family. The public interest in the suppression of torts, and providing civil remedies to the out-

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raged and oppressed, which will keep them from resorting to violence, overrides the humane feeling towards private individuals. The sufferings which they may entail on those around them often operate more powerfully to deter men from crime than any moral or social obligation, and it would be a strange state of law which allowed a husband to leave his wife penniless by his contracts, but gave no redress to a person who involuntarily became his creditor, by his wrong, and yet permitted the husband, while holding his injured victim off with one hand, to squander the property with the other, in spite of and in defiance of the claims of the law.

It is impossible to believe that the political reasons referred to as prompting the homestead apply to a case like this. Can it be conceived that any public policy dictates fostering a race of "*tortfeasors*" in the community? Is the homestead intended to be the asylum of the violent? Is immunity from responsibility for violence calculated "to foster views of manly independence in the citizen?" Does the knowledge that a man may seduce, slander, beat, cheat, or do any tort he chooses, and be utterly irresponsible, unless he owns over \$2000, "tend to the settlement of a country by inviting immigration, and by holding out inducements to the improvement of property?" I rather think not. It is absolutely ludicrous to read the reasons assigned for allowing the homestead, and compare them with the results arising from holding it good against torts. To adopt such a construction is to restore the old-time shot-gun policy to a State as the only hope of redress. The reasons for a homestead to unfortunate debtors is very good, but totally inapplicable as applied to *tortfeasors*.

There can be no doubt that our lawmakers used the words "debts contracted" advisedly, and with full knowledge of their restricted meaning. All through the Code the distinction between debts contracted and torts is referred to, and wherever both are involved both referred to. Thus in chapter 148, section 2, p. 1009, an attachment is allowed for the recovery of any claim "or damages for any wrong." Can it be believed that if our framers intended the homestead to cover "damages for any wrong" they would have failed to express it?

Lord Mansfield was very fond of saying that the plea of

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infancy was given as a shield and not to be used as a sword. So of this homestead law. It was passed for the protection of the unfortunate, but not of the vicious.

I nearly omitted to refer to the decision upon the Constitution of North Carolina, in *Dellinger v. Tweed*, 66 N. C. 214. That decision was rendered by three judges against two, and the two in the minority were Chief Justice Pearson and Rodman, J., the former by far the ablest member of the court. Judge Pearson's opinion is one of the most lucid and cogent I know upon this subject. But the language of the North Carolina statute is different from ours. "Section 2. Every homestead . . . not exceeding in value \$1000 . . . shall be exempt from sale under *execution*, or other final process obtained *on any debt*." I do not think the decision was right even upon this language. Still the language is not as strong as ours, for "debt contracted" is a smaller term than "debt."

The brief contained also paragraphs raising other objections to the exemption.

*Brief of James Caskie, bankrupt's counsel, in reply.*

The counsel for the Mitchells in his note yields the point made in his answer in response to the bankrupt's petition, that the bankrupt is not, in fact, a citizen of this State, and therefore cannot claim the homestead exemption. He says:

It is conceded that whatever his intentions were, he did not, in point of fact, effectuate them so as to lose his citizenship. The evidence fails to show that he, in point of fact, did abandon his residence in Virginia, whatever were his intentions, or whatever they are now.

This much being conceded, it only remains for us to discuss the question whether the homestead exemption can be claimed as against a judgment for a tort, and, if so, in what manner the homestead is to be held. We discussed these questions at length in our first note, and therefore will have but little to say in regard to them at this time. Before proceeding to answer the *tort* and *usufruct* propositions of the counsel for the Mitchells, we must notice some of the pleadings and evidence in this case as stated by him. The counsel quotes the evidence of the bankrupt and his wife to prove that their present intention is to

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leave the State. We deny that their evidence shows any such intention. But even if it does show such an intention, we insist that all evidence in this regard is not admissible, and that it is not in the province of the court to inquire into the present intention of the bankrupt in regard to leaving the State. In support of this proposition we refer to the following decision made in this State:

The court is further of the opinion that the Circuit Court did not err in excluding evidence of defendant's intention and declaration as to leaving the State since the date of the attachment. The fact in controversy is the existence at the time of suing out the attachment of an intention on the part of the defendant to leave the State. The existence of such an intention formed afterwards is not material, and not a sufficient ground for suing out an attachment. Declarations of the defendant made since the date of the attachment, as to his then existing intention to remove from the State, are not, in themselves, evidence tending to prove the existence of such an intention at the time of suing out the attachment.—*Wright v. Rambo*, 21 Gratt. 161.

In regard to the wife's evidence on this point (which we objected to at the time the question was asked), we refer to the following decision:

An examination of the bankrupt's wife will only be ordered when a *prima facie* case is made out by affidavit. It is not the intention of the statute to destroy the usual and proper confidence between husband and wife any more than between client and attorney. The cases in which the wife may be examined are where she is, on reasonable grounds, suspected of having, or having had property in her possession, which should have been surrendered to the assignee, or to have participated actively in other frauds upon the statute.—*In re Gilbert*, 3 B. R. 152, s. c., Lowell, 340.

The bankrupt denies that the trial of the cases of *Mitchell v. Radway* took place at the time they did, because their counsel yielded to the importunities of Radway, and his representations that he was detained in this State by the pendency of the causes. Not one word of evidence has been offered to support any such statement. The bankrupt claimed his homestead by deed duly recorded on 12th June, 1877, which was several days before any judgments were obtained against him. The attachments issued previous to this did not affect this homestead, as they were at best but conditional liens, and the filing of the petition of Radway,

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praying for adjudication as a bankrupt, dissolved the attachments, only about forty days having elapsed between the date of the suing out of the attachments and the adjudication in bankruptcy. No judgment having been entered upon the attachments, it can, at best, be considered nothing but an attachment upon mesne process, which the adjudication in bankruptcy dissolved. It seems to us that it was the manifest intention of our statute to exempt to the householder property to the amount of \$2000 free from all debts, except such as were specially named in the statute. It is absurd to think that the words "debts contracted" are to be taken in their narrowest sense. The word "debt" was used to embrace every kind of obligation to pay money, and certainly a judgment on a tort is such an obligation. The word "contracted," used, as it is, with the words "heretofore or hereafter," obviously has reference to the time at which the obligation to pay the money was incurred. This construction is rendered sensible by striking out the words "heretofore or hereafter," since we must suppose that if these words relative to time had been omitted the word "contracted" would also have been omitted. The statute would then have read that the householder was entitled to \$2000, as against any *debt*, except such as it especially enumerates. Just here we again call attention to the amendment to the bankrupt law, March 3d, 1873, which, in our first note, we quoted in full. This act, according to our construction, gives the bankrupt \$2000 exemption, no matter whether the judgment was founded upon a debt *ex contractu* or *ex delicto*. We are unable to discover from the arguments of counsel any good grounds to sustain his proposition, that if the bankrupt is entitled to the homestead exemption, even then it is a mere usufruct, and that the court must require him to give bond and surety before he can get possession of it. If this is law, then the homestead exemption is a shadow; by it no benefits are conferred upon the householder, and the sooner it is erased from the statute-books the better. It is an exemption granted the householder, but clogged with such restrictions as in most cases to be entirely of no benefit to him. Such we cannot suppose to have been the intention of the Constitution. Judge Waite, in the case of *Solomon*, gave the true interpretation to the meaning of the statute, in re-

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gard to the manner in which the householder should hold the exemption, when he said that the intention of the law was to give the householder *full and absolute control over the exemption*. Requiring him to give bond and surety, or investing the fund by direction of court, certainly takes from the householder this full and absolute control mentioned by Chief Justice Waite. It makes the statute inoperative, and such was not the intention of the Legislature.

The following was the opinion of the court:

HUGHES, J.—The principal question in the case is whether under the Virginia law the homestead is good against judgments founded on *torts*.

The courts of some of the States, proceeding upon the particular phraseology of the statutes of those States, have held that their homestead statutes did not embrace liabilities upon *torts* among those over which the exemption should prevail. But I do not think that the case at bar, depending upon the law of Virginia, can be affected by such rulings.

The language of our statute is, that the head of a family shall be entitled to hold, exempt from levy, etc., “on any demand for any debt heretofore or hereafter contracted,” property not to exceed a certain value. The only question is whether the word *contracted* is used here in the narrow sense of an express contract formally entered into between two persons, by which at least one of them promises or undertakes something for a consideration, or whether it contemplates *implied* contracts, also; for the law raises implied contracts as well upon *torts* as upon express promises. The words preceding “*contracted*” in the phrase imply a latitudinous intention on the part of the Legislature. This latitudinous intention would have been undeniable if the word *incurred* had been used in the place of *contracted*. But as the word *incur* does not so strictly belong to the technical parlance of lawyers and legislators as the word *contract*, and as the word *contracted* is a synonym of *incurred*, I think we have a right to assume from the broad purport of the preceding words, “any demand on any debt,” that the Legislature intended its term *contracted* to be liberally interpreted.

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The verb to contract has a variety of meanings, viz.: to shrink; to shorten; to wrinkle, as the brow; to betroth; to acquire, as a habit, or a cold, or a disease; and to *incur*, as a risk, a debt, an obligation, a penalty, or a disability. Interpreted in this last sense, of *incur*, it seems to run with the spirit of the words which precede it in the phrase in which it is used; while, by confining it to the narrow and strictly commercial meaning, we make it jar with the liberal tenor of those preceding words. What right, what warrant have we thus to do violence to what seems to be the natural meaning of the language of the Legislature? Upon what reason, or rule of statutory construction, can we justify such a rigid, illiberal interpretation of a provision of law, most liberal in its purpose and tenor, as would strip it of half its effect and value? I think we are not only not bound to do so, but that we would not be justified in giving this law such a construction.

Going back to the word *debt*, used in the phrase under discussion, why should we give it a narrow meaning when it appears that "any debt" is intended? A debt is, in law, an obligation to pay money, and the obligation may arise *ex contractu* or *ex delicto*. The obligation may be express, *ex contractu*; or implied, *quasi ex contractu*. It may arise *ex delicto*, upon actual tort; or *quasi ex delicto*, upon what the law chooses to treat as a tort. And thus it is plain that a debt or obligation may be *contracted* as well through a *tort* committed, as a bargain entered into.

Passing now from a philological treatment of the subject, let us consider it from a legal standpoint.

The seventh section of article 11 of the Virginia Constitution, previous sections of which provide a homestead exemption, is in these words: "The provisions of this article shall be construed liberally, to the end that all the intents thereof may be fully and perfectly carried out." By this direction, in our construction, all we have to do is to find what was the "intent thereof," and then if the provisions of the article can be so construed, even though they require a liberal interpretation, they must be "construed" in the sense which will effect the object of this constitutional provision, for so we are directed to do.

No restricted sense is to be allowed to words if by so doing

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the object of the article is in any way defeated, but a broad meaning is to be put on the language used, always looking to the end for which the article was adopted.

Stress is laid by exceptants' counsel on the fact that a single member of the Virginia Convention drafted (for all that we know without the knowledge of the great majority of the members) the homestead sections in similar terms to those of the New York law. We can't take cognizance of legislative proceedings, but are obliged to construe laws exclusively by their own terms. But even if we could construe them by extraneous circumstances, does the New York law contain a provision enjoining a "liberal construction?" I think not. No; our own statute must be construed by its own terms—all of its own terms.

We have had the "intent" of our homestead provision plainly declared by our highest court. In *Hattorf v. Wellford*, 27 Grat. 360-1, Judge Staples, speaking for the court, says the policy of homestead exemptions (this act being under discussion) is twofold: one political, the other benevolent. Of the benevolent he says: "The possession of the homestead is the security of the family against the improvidence, the follies, the imprudences of the husband and father. Householder or head of a family are the terms pervading these homestead enactments—a home for the destitute and helpless, secure from financial ruin, and the pursuit of creditors. . . . No one can look through these various statutes without at once seeing that 'protection of the family' is one of the leading ideas upon which these exemptions are founded." And on page 363: "It has been held, in Georgia and North Carolina certainly, and probably in other States, that the object of the homestead laws is the security of the debtor and his family against the demands of the creditor."

It is admitted that C. L. Radway is a householder, or head of a family, and that he is now, and was when he claimed his homestead, a resident of Virginia. His right to a homestead, however, is contested on two grounds.

1st. That he intends hereafter to remove from the State.

2d. That the Mitchell claims against him arose from torts.

As to the first. The law does not expressly, nor by implication, require the householder to agree to live in Virginia all his

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life before he can obtain his homestead ; and the requirement of this condition by a court would be to ingraft an entirely new provision upon the Constitution, which would destroy entirely, in many instances, the object of the homestead article as it stands.

I cannot appreciate the argument that if his homestead is allowed to Radway and he thereafter leaves the State he will commit a fraud on his creditors. If there was anything in it the argument would apply to every person asking for his homestead.

As to the second ground, in order for it to be tenable the words of the article must be given the strictest and most technical meaning and the most *illiberal* construction. Such an illiberal construction would entail difficulties not anticipated. The words of the article are that the person shall "hold exempt from levy, seizure, garnishing, or sale, under any execution, order, or other process, issued on any demand for any debt heretofore or hereafter contracted."

Strictly speaking no execution ever issues on any demand for a debt. It is only after the demand for the debt has become merged in a judgment that execution issues. Indeed a strict construction of the words would exclude judgments, which are not in themselves "debts contracted," though sometimes founded on debts contracted. Again, if the words "debts contracted" are to be taken in their narrowest meaning, as seems to be claimed, then they describe only debts which are *expressly agreed* to be paid by the debtor, and all other debts created by implication of law are excluded. And this is the ground on which it is contended that torts are not included in the words. This narrow construction would exclude from the operation of the homestead law many liabilities other than torts—in fact, all debts for which an *express promise to pay* cannot be produced. Such was not the intention of the law, else it has failed wofully in the effort to provide "a home for the destitute and helpless, secure from financial ruin and the pursuit of creditors."

Let us see what is a liberal construction of the words "debt contracted."

Says Bouvier :

*Debt* is a sum of money due by certain and express agreement.

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In a less technical sense, as in the "Act to regulate arbitrations and proceedings in courts of justice" of Pennsylvania, passed 21st March, 1806, sec. 5, it means any claim for money. In a still more enlarged sense, it denotes any kind of a just demand, "as the debts of a bankrupt." One of the meanings given in our dictionaries to the word "contract," as a verb, is "to incur." So that a "debt contracted," in an enlarged or literal sense, means "any kind of just demand incurred."

We have seen that the words "execution issued on any demand for any debt contracted," mean execution issued on a judgment, as executions never issue on anything else. When we look to the legal effect of a judgment we find it is a "debt contracted." Says Blackstone, chapter 9, book 3, 158-9:

From these express contracts the transition is easy to those that are only implied by law, which are such as reason and justice dictate, and which therefore the law presumes that every man has contracted to perform, and upon this presumption makes him answerable to such persons as suffer by his non-performance. Of this nature are, first, such as are necessarily implied by the fundamental constitution of government, to which every man is a contracting party: And thus it is that every person is bound and hath virtually agreed to pay such particular sums of money as are charged on him by the sentence, or assessed by the interpretation of the law. . . . . Whatever, therefore, the law orders any one to pay, that becomes instantly a debt which he hath beforehand contracted to pay. . . . . So that if one hath once obtained a judgment against another for a certain sum . . . . he may afterwards bring an action of debt upon this judgment, and shall not be put upon the proof of the original cause of action; but upon shewing the judgment once obtained still in full force and yet unsatisfied, the law implies that by the original contract of society the defendant hath contracted a debt and is bound to pay it.

From this it follows that every judgment, whatever may have been the nature of the action in which it was obtained, is a "debt contracted," and as the Constitution looks to all claims as turned into judgments before they are affected by the homestead provision, which looks to exemption from process of execution upon judgments, all judgments are included in the words "debt contracted."

This is made perfectly plain by looking to the exceptions to the operation of the homestead. If these exceptions had not been included in the words "debt contracted," in the first part and general provision of the article, there would have been no

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need to expressly mention them as cases to be excepted from the operation of those words. There are six exceptions, and three of them may, and two of them must, embrace claims put upon the debtor by implication of law, and not by express contract. Services rendered by a laboring man or mechanic, liabilities incurred by a public officer, and rent, may all be charged on a householder without any express contract on his part to pay.

A lawful claim for taxes, levies, or assessments, and the legal or taxable fees of any public officer or officers of a court, are put on the debtor by statute, and not by contract. If they were included in the words "debt contracted," as undoubtedly they were, else they would not have been particularly excepted from the debts contracted liable to the claims of homestead, how can it be said that damages recovered in actions of tort, which are likewise put upon the debtor by law, without any express contract, are not embraced in the same words?\*

As another proof that the Constitution uses the word *debts* in its largest sense, I refer to sec. 4 of this art. ii: "The General Assembly is hereby prohibited from passing any law staying the collection of *debts*, commonly known as stay laws." Should the Assembly pass a law staying the collection of judgments on tort, that law might with some reason be held not to include a *debt* in the meaning of this homestead article.

Some stress has been laid in the argument at bar on the fact that one or more of the decisions which have held the homestead good against damages in actions of tort, stated, as one ground of the decision, that the homestead could not, in the particular case, by reason of statute, be alienated by the husband, except with the consent of his wife, and, *ergo*, he should not be permitted to incumber by his tort what he could not alone convey, and it is claimed that our statute is not similar in that respect. But so to hold is to overlook section 7 of chapter 183, p. 1171, of our Code, in which the joint deed of husband and wife is re-

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\* The use of the word "incurred" in the exceptions, shows that the words "debt contracted" and "debt incurred" are interchangeable terms in this article, and destroys effectually the narrow argument on the word "contracted."

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quired to mortgage, incumber, or alien the homestead set apart in land.

I would refer to *Dellinger v. Tweed*, 66 N. C. 206, to 17 Wis. 395, and to *Conroy v. Sullivan*, 44 Illinois, 451, for decisions sustaining this view as to the validity of homestead over damages in cases of torts.

The argument that our homestead was the suggestion of a New Yorker, and therefore must be construed by New York decisions, is entitled to no weight, for the provisions are not identical, and the exceptions, adopted by the Convention, themselves show that they understood the terms "debt contracted" in its broadest sense. Such arguments, however, are never more than persuasive, and to be used in default of other and better reasons.

The right to the homestead does not depend on the question as to whether the attachments have ceased to be *mesne* process or not. If final judgment had been obtained, and execution were in the hands of the sheriff on the attachments, as well as on the claim, section 16, of chapter 183, p. 1173, of Code of 1873, provides a way to set apart the homestead, showing that no judgment can be a lien paramount to the claim of homestead.

Much has been eloquently said by the learned counsel for the Mitchells on the nature of the torts on which they recovered. They cannot be justified or palliated, even if the females were in fault themselves; the cases and their aggravations have been passed upon before the jury, in their verdict, and the only question here is one purely legal, and we need, for its elucidation, no appeal to the feelings. Mrs. Radway and her child ask that the tort of the bankrupt shall not strip them of their homestead, which the law gives them secure "from the improvidence, the follies, and imprudencies of the husband and father."

On the whole, I have no hesitation in overruling the exceptions to the register's report, and will make an order granting the bankrupt's petition.

Statement of the case.

*United States District Court, Eastern District of Virginia, at  
Richmond, April, 1878.*

IN RE THOMAS BALMER, BANKRUPT.

Creditors who have not proved their claims in bankruptcy until after the day fixed for showing cause against the bankrupt's discharge, cannot then make objection to the discharge upon any other ground than fraud distinctly and specifically charged.

A creditor may consent to the bankrupt's discharge by an attorney in fact, or by his counsel, stating in open court that the consent is given; and it seems that an assent to the discharge need not be "in writing," since the enactment of section *nine* of the amendatory bankruptcy act of June 22d, 1874, amending section 5112 of the Revised Statutes of the United States.

In bankruptcy.

This was an application for a discharge in bankruptcy on a certificate of conformity from the register. The day for showing cause against the discharge was the 10th of December, 1877. The register states that :

On the day to show cause the only proof on file was that of Thomas Dunnill for a balance of \$14,809.87, and the bankrupt produced a power of attorney, executed by Dunnill (now in Europe) some time before the bankruptcy, by virtue of which he claimed the right to consent to his own discharge. I thought the authority was insufficient, and so he has since procured and filed the necessary assent of that creditor (and of E. E. Taylor & Co., who have since proved their debt).

Since the day to show cause, the following proofs in opposition to the discharge have been filed :

J. F. Allen & Co.,	.	.	.	.	.	.	.	.	\$60	57
Turpin & Bro.,	.	.	.	.	.	.	.	.	100	54
Jackson, Turpin & Co.,	.	.	.	.	.	.	.	.	252	42
John T. Wadsworth,	.	.	.	.	.	.	.	.	1045	00
									<hr/>	
									\$1458	
									53	

The assent to the discharge is given by the necessary number and amount of creditors, but was not filed until after the day to show cause as shown above, February 28th, 1878.

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Statement of the case.

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The proofs of claims by the four creditors named by the register were filed on the 6th February, 1878.

The register afterwards made a supplementary report, in which he stated :

On the day to show cause why the discharge of the bankrupt should not be granted, the only creditor who had then proved his claim, Thomas Dunnill, appeared by counsel and offered to assent to the discharge upon the power of attorney previously referred to. This I thought was insufficient, and so I told Mr. Coke, the attorney, if he would give the assent for his client, there being no other claim proved, that I would consider the assent to be given. The amount of Mr. Dunnill's claim being very large, Mr. Coke thought he had better get the assent of his client personally, and I think I suggested to him to send the necessary paper to Europe for that purpose, which he concluded to do. At that time I knew of no opposition to the discharge, and I had been under the impression that your honor had ruled that the assent could be given after the day named ; in fact, the amendment of June 22d, 1874, left some doubt upon my mind in regard to this subject, and I had then determined to lay the matter before your honor at the earliest opportunity, which you will no doubt remember I did. I therefore left the case open for the assent of Mr. Dunnill, to be filed under the former practice in such cases, making no regular adjournment, nor fixing another day.

March 9th, 1878.

The bankrupt's counsel states in his brief, that on the day for showing cause against the discharge, " a written consent, signed by Thomas Balmer, attorney in fact for the creditor Dunnill, was tendered to the register and rejected as insufficient, which consent in writing I insist was legal and valid."

No objection in writing to the discharge, in conformity with general order in bankruptcy 24, was filed in the cause until the 15th March, 1878. The objection then filed was in the form of a petition by the creditor John T. Wadsworth, setting out that he had reason to believe that the bankrupt Balmer did not surrender all of his property to his assignee, to wit, that he did not surrender a certain piano-forte now in Balmer's use, nor certain jewelry owned by him. It prays that the bankrupt may be made by order of court to submit to an examination under oath touching this charge ; and that pending such examination the bankrupt's present application for a discharge in bankruptcy may be stayed.

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Opinion of the court.

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The following was the decision of the court :

HUGHES, J.—Two questions arise for determination :

1. Can creditors who have not proved their claims in bankruptcy until after the day fixed for showing cause against the discharge of the bankrupt, then make objection to the issuing of the discharge on any other ground than fraud specifically and distinctly charged ? and if not

2. Whether the consent of the only creditor or creditors who have proved their claims at the day for showing cause against the discharge, as given in this case, is sufficient under section *nine* of the amended bankruptcy act of 22d June, 1874, amending what is now section 5112 of the Revised Statutes of the United States ?

1. I think it is perfectly clear under general order 24 in bankruptcy that the objection to the discharge in this case was not made in time or in proper form ; and that it therefore cannot be allowed by the court. There has been no “specification in writing of the grounds of opposition” to the discharge filed at all in this cause. The petition does not in terms make objection to the discharge. It simply asks that the bankrupt’s application may be stayed to await the result of an examination of the bankrupt under oath. It does not charge fraud or any wilful intent to defraud on the part of the bankrupt. It merely sets forth the belief that a piano-forte and certain jewelry were not surrendered, and asks a stay of the application for discharge.

But even if this paper were such a “specification of the grounds of opposition” to the discharge, as is contemplated by general order 24, it was not filed “within ten days after the day” on which the creditors were required to show cause against it. That day was the 10th December, 1877. If we consider that the whole time during which the register kept the matter open, waiting for a personal consent in writing to arrive from Dunnill, was in law but one day ; yet, that paper having arrived on the 21st January, 1878, the objection was still too late, because of not having been filed within ten days after that day. And even if we consider that the matter was before the register until the date of his certificate of

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Opinion of the court.

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conformity, to wit, the 28th February, 1878, the objection was still not in time; for it was not filed until the 15th March, 1878.

I think, therefore, that, as "a specification in writing of grounds of opposition" to the bankrupt's discharge, this paper is insufficient in form; and I also think that it was invalid as not in time, under order 24. It can have no effect as such a "specification," and the objecting creditor, Wadsworth, must resort to his remedy under section 5120, which allows a discharge, after it is granted, to be revoked within two years for fraud charged and proved against the bankrupt.

2. The consent which was given in this case, by the consenting creditor, Dunnill, seems to me to have been, under all the circumstances, sufficient. That creditor (who was the only one who had proved his claim) was in Europe. The bankrupt was his general attorney in fact here, still empowered to act for him, inasmuch as his bankruptcy had not terminated that power. Story on Agency, section 486. That attorney either offered or tendered to the register for his principal, a consent to the discharge in writing. The register declined to receive Balmer's consent as attorney in fact for Dunnill, but held the matter open until a specific consent in writing, signed by Dunnill personally, could be obtained from Europe, which in due course of mail was received, and was filed on the 21st January, 1878. Even if the clause in section 5112, which requires the consent of creditors to be in writing, has not been repealed by the *ninth* section of the amended bankruptcy act of 22d June, 1874, the consent in writing which was offered or tendered to the register was valid and sufficient. The refusal of the register to receive such a paper as the law requires to be "filed in the case" cannot affect the rights of the person whom the law requires to file it, if he tenders it, or offers to file it. See *Bennett v. Hunter*, 9 Wallace. The creditor, through his duly accredited attorney, did all that he could do.

But in addition to the action of the attorney in fact, we have also that of Mr. Dunnill's attorney at law. This creditor's counsel offered also before the register to assent to the discharge. This assent could, of course, only be given orally, and was given orally. It is not necessary in this case to decide whether a creditor's consent to a bankrupt's discharge must be in writing; but I will say

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Statement of the case.

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that, inasmuch as section *nine* of the amending act of June, 1874, repeals in terms the essential provision of section 5112, I think it repeals along with it the requirement that the consent of creditors shall be in writing, at least so far as to make a declaration in open court by the creditor that he consents a sufficient consent in the contemplation of the *ninth* section of the amended act. If the consent is given out of court, it must needs be in writing without doubt. But if it be given orally before the register or in court before the judge, and is made to appear on the record by either the judge or the register, I deem such declaration of consent to be sufficient in contemplation of the amendatory section nine.

On the whole I think the consent of Dunnill to Balmer's discharge in bankruptcy, as it appears on the face of the record before me, to be as complete as it could well be made, and that it is sufficient. The discharge may issue.

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*In the United States District Court for the Eastern District of Virginia, at Norfolk, October 21st, 1879.*

P. C. DUNSTAN *v.* THE STEAMTUG R. R. KIRKLAND.

Damages to the person of one on board of a vessel, resulting from collision, may be recovered by libel in admiralty from the vessel in fault.

It is the duty of a steamer, in the act of backing, to keep a lookout in the stern of the vessel.

It is fault in a steamer, when about leaving a wharf, not to give the usual signal of three long whistles.

It is too late to take advantage of a supposed variance between the proofs and the allegations in the pleadings after the evidence is closed and the argument for the defence is begun; and, in any event, the evidence must be material.

Steamers must keep out of the way of sail-vessels, whenever there is possible danger of collision.

IN admiralty. Libel for damages to the person from the collision of two vessels. The amount of damages claimed was \$8000.

At about half past three in the afternoon of the 1st of March,

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Statement of the case.

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1879, the sloop Annie Clarke, in charge of her owner and master, the libellant in this case, with two other experienced seamen on board, was crossing the harbor of Norfolk, southwardly from the Old Dominion Steamship wharf, on the Norfolk side, towards Peters & Reed's wharf on the Portsmouth side, which is the next wharf south of another one on that side leased by the Old Dominion Steamship Company.

When the sloop was within a hundred yards of the latter wharf, and abreast of it, the ferry-boat came out ahead of her from her dock in Portsmouth to cross over to Norfolk, and was about twenty yards from her, a circumstance which made it impracticable for the sloop to change her course to her port side. As the sloop approached the wharf of Peters & Reed in these circumstances the steamtug R. R. Kirkland, which had shortly before touched at the Old Dominion wharf next adjoining, backed off from the latter wharf nearly at right angles, and continued backing for a distance of some seventy-five yards, without heed to the passing sloop. In doing so the tug's stern collided with the sloop, and her "eye-bolt" punched a hole three inches large in the hull of the sloop, which placed her in a sinking condition. The two men jumped off the sloop on board the tug, but the leg of Dunstun, the master, was caught between the tug and the sloop's cabin and greatly bruised and injured. Dunstan was lifted on board the tug. From this injury he was entirely disabled for about six weeks, during part of which time he suffered a good deal of pain. He has since been crippled with a stiff knee, and may be so afflicted for the rest of his life.

The tug had no lookout on her stern when she backed out into the channel, and previously to backing out neglected to give the usual signal of three long whistles to indicate that she was about to leave her wharf. Though the sloop was under sail and plainly visible, she was not seen by the master of the tug before the collision, and the tug took no measures to keep out of her way.

Dunstun, the libellant, is a poor man, thirty-five years old, with a wife and large family of children dependent upon his labor. This is the second year of a lease he has for three years

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Brief of libellant's counsel.

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upon a trucking farm near Norfolk. The physician intimated that libellant's injury would be permanent in all probability.

*Messrs. Garnett & White and Sharp & Hughes appeared for the libellant.*

*Mr. W. H. C. Ellis for the owner of the Kirkland.*

*Brief of Libellant's Counsel.*

I. *The Burden of Proof.*—In a collision between two steamers or two sail-vessels the burden of proof is on the libellant. But in a collision between a steamer and a sail-vessel, the burden of proof is on the steamer, irrespective of who is the libellant. Every presumption is against the steamer. In this case the burden of proof is on the steamtug R. R. Kirkland. See *The Washington Irving*, Abb. Adm. 336; *Seaman et al. v. Crescent City*, 1 Bond, 105; *Steamboat Oregon v. Rocco*, 18 How. 570; *The R. B. Forbes*, 1 Cliff. 331; *The Fannie*, 11 Wallace, 238.

II. *Relative Degree of Caution required as between Steamers and Sail-vessels.*—It is always the duty of the steamer to avoid the sail-vessel. All that the sail-vessel has to do is to keep her course. If she does not alter her course and a collision occurs the steamer is in fault. Desty on Shipping and Admiralty, sec. 357, and cases there cited; Id. sec. 375, and cases cited.

III. *The Want of a Lookout is Fatal.*—The tug had no lookout or watchman on her stern, or aft, when backing. *McGrew v. Steamer Melnotte*, 1 Bond, 453; *The State of New York*, 3 Bened. 253; *The Morning Star*, 4 Biss. 62, syll. 6; *The Comet*, 9 Blatchford, 323; *The Empire State*, 2 Biss. 216.

IV. *Remedy in rem for Injuries to Person.*—*Miller v. The W. G. Hewes*, 1 Wood, 363; *Steamboat New World v. King*, 16 How. 469; *The Sea Gull*, Chase's Dec. 145; *The Gregory and The Washington*, 2 Ben. 226, affirmed 9 Wallace, 513.

V. *Error in Extremis.*—It is no defence to this action to say, as the answer does, that the men on the sail-vessel might have

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Opinion of the court.

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gotten out of the way, even after they saw that a collision was inevitable. Acts done in the excitement of the moment are not faults, and are not sufficient to exonerate the vessel by which the danger was first brought about. Such acts are excusable. Desty on Shipping and Admiralty, sec. 381, and cases cited.

VI. *Amount of Damages.*—Rule: “*Restitutio in integrum.*” Loss of time, injury to the vessel, all kinds of expenses incurred, such as doctor’s bill, expenses of nursing, etc., are to be estimated; physical or mental pain and suffering caused thereby are grounds for damages, even for heavy damages. *The D. S. Gregory*, 2 Ben. 226; *Curtis v. Rochester and S. R. R. Co.*, 18 N. Y. 534.

The grounds of the defence are indicated in the opinion of the court.

HUGHES, J.—It seems plain to me from all the evidence in the case, that the tug was at fault in three respects, namely:

1st. She failed to give the usual signal of three long whistles, to announce her intention of leaving the wharf at which she had touched.

2d. She had no lookout in that end of her which was moving foremost. It is just as incumbent upon a steamer backing to keep a lookout well aft, as upon a steamer moving on to keep a lookout well forward.

3d. She did not “keep out of the way” of the sailing vessel, as she was required to do by the 20th Rule of Navigation, established by act of Congress. See United States Revised Statutes, p. 818.

Indeed the answer in this cause seems virtually to consider that the tug was in fault, not only in its admissions of fact, but in its omission to negative the implication of fault in the respects just set out.

It is proper for me to notice an objection made in the argument by the learned counsel of the claimant, that, although the libel alleges that the sloop was bound for the Old Dominion

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Opinion of the court.

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wharf in Portsmouth, yet the proofs showed that she was aiming for Peters & Reed's wharf; and he claimed that there was a fatal variance between the *allegata* and *probata* of the plaintiff's case. I think the objection is untenable, for the reason that it was made too late, and that the variance is not material. The evidence shows that the two wharves lie next each other; the chart of the harbor shows that the course of a vessel sailing from an opposite point on the Norfolk side to one or the other of these wharves on the Portsmouth side would not vary half a point of the compass; and the proofs establish that the collision occurred irrespectively of the circumstance that the sloop was moving on a course half a point away from the one pointing to the Old Dominion wharf adjoining Peters & Reed's. The variance in this case, therefore, is not material. The variance between the proofs and the allegations, whether of the libel in setting out its case, or of the answer in stating its case, in order to defeat either party to the pleadings, must be "essential in its character." *The Washington Irving*, Abbot's Adm. 336.

Moreover, in order to entitle either party to the benefit of a variance, objection must be taken when the evidence is offered at the trial, and comes too late if made after the evidence is closed and the cause is under argument. *Roberts v. Graham*, 6 Wallace, 578.

These matters being disposed of I come now to deal with the question of the amount of damages to be awarded the libellant, no objection being raised to the jurisdiction of an admiralty court to award damages to a person injured by the collision of two vessels against the vessel in fault.

It must be confessed that the ascertainment of damages by a judge in a court of admiralty is not only an unpleasant but a difficult task, and is liable to great abuse. I regret that it cannot be referred to a jury of twelve men, that best of all tribunals for the assessment of damages between man and man. I shall approach a conclusion on the subject by careful steps, and endeavor to arrive at a result that will commend itself to the approval of any impartial, well-balanced, and practical mind.

It was not shown in the evidence that the sloop was permanently injured by the collision. The injury was promptly re-

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Opinion of the court.

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paired by the owner of the Kirkland, and I think an item for repairs can have no rightful place in the account of damages now to be made up.

Nor is there anything due on the score of medical bills. These have been paid by the claimant, and were quite inconsiderable in themselves, amounting to less than \$25.

We have, therefore, only to consider what is to be allowed for the three following items, viz., for pain and suffering ; for loss of time and wages ; and for permanent disability ; these being the grounds of allowance for which we have precedents in the reported cases.

1. The suffering of the libellant in consequence of his wound, though doubtless severe for a few days, was soon greatly assuaged, and I think a liberal allowance on this score would be \$250.

2. The loss in farming operations resulting to the libellant, while quite serious for a poor man, cannot in this case be estimated at the very high figures which we see reported in many cases in this country and England. True, the injury occurred at an important season of the second year of his three years' lease of the trucking farm on which he lived, which was a year in which he expected, with reason, to make up in profits for the unremunerated labor and preparation of the first year. True that the legitimate expectation for this second year was, that the results should compensate for the labor and investment of both years. But yet I do not think I would be justified in estimating these profits from one man's labor, on a small farm of indifferent fertility, at more than \$500 for the two years named.

3. We come, last, to the permanent effect of the injury sustained by the libellant, the damages allowable for which is the more difficult of ascertainment for the reason that they can be little other than conjectural. The knee upon which the bruises which were suffered concentrated, is now still enlarged and stiff, seriously impeding the movements of a laboring man. While the physician who attended the libellant and who testified at the trial would not express the positive opinion that it would continue so permanently, yet all that he said seemed to indicate a

Opinion of the court.

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belief on his part that the probabilities were on the side of a permanently stiff and enlarged knee.

The libellant is a poor man, with a large family to support. He is thirty-five years of age, and has a long "expectation of life." The conditions of his case are, therefore, such as appeal strongly for a liberal allowance. I therefore feel authorized by established precedents and by considerations of natural justice to award damages, on this score, to the amount of \$1000.

A decree may, therefore, be taken for \$1750.

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*United States Circuit Court, Western District of Virginia, at  
Lynchburg, Fall Term, 1879.*

J. & W. SELIGMAN & CO. v. CHARLOTTESVILLE NATIONAL  
BANK.

A national bank, upon the deposit of collateral security with it, has no power to guarantee the obligation of the person making such deposit.

A national bank may lend money on personal security, but not its credit.

IN covenant.

The facts of the case are set out, as far as they are material, in the decision of the court rendered by

BOND, J.—The declaration in this cause sets out that J. & W. Seligman & Co., of New York, are bankers; that on the 14th day of May, 1875, B. C. Flanagan & Son made a proposition to the Charlottesville National Bank, in writing, to this effect:

In consideration of the guarantee of a letter of credit to the extent say of (£5000) five thousand pounds sterling, to be issued by J. & W. Seligman & Co., of New York, we propose to deposit with the Charlottesville National Bank business paper to the extent of \$35,000. For such amounts of said letter of credit as we may use we propose

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Opinion of the court.

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the bank shall discount of said paper at 9 per cent. a sufficient amount to cover the amount used by us, holding the balance as collateral security for same; the bank to receive the money under the letter of credit which is used in the discount aforesaid.

It is further agreed that we will take the risk, as to any fluctuations in gold, so that the difference in rate of interest between that charged us and that paid by the bank shall not be less than at the rate of 2 per cent. per annum in favor of the bank, the bank having the benefit of any fluctuations which may increase their profit.

This proposition was accepted by the bank by the following resolution of its board:

*Resolved*, That the president and cashier be and they are hereby authorized, in accordance with the proposition submitted by B. C. Flanagan & Son to guarantee to Messrs. J. & W. Seligman & Co. drafts drawn under their letter of credit, in favor of B. C. Flanagan & Son to the extent of £5000 on the deposit with the bank, of business paper by Flanagan & Son as collateral security to the extent of \$35,000.

The plaintiffs aver that in consideration of this acceptance of Flanagan & Son's proposition by the bank, they gave to Flanagan & Son a letter of credit for £5000, as follows:

No. 1023.

NEW YORK, May 25, 1875.

MESSRS. SELIGMAN BROS., London.

SIRS: We herewith beg to open with you a credit in favor of Messrs. B. C. Flanagan & Son, of Charlottesville, Va., for £5000, of which they will avail themselves either in their own drafts or the drafts of such parties as they may accredit with you at four months after sight. You will please honor said drafts to the above amount, advising us promptly of maturity.

J. & W. SELIGMAN & Co.

Flanagan & Son deposited the \$35,000 business paper with the bank, and the bank gave its written guarantee to Messrs. J. & W. Seligman & Co., as follows:

In consideration of one dollar, to us in hand paid, the receipt of which is hereby acknowledged, we guarantee to Messrs. J. & W. Seligman & Co. the prompt and punctual payment of all sums and amounts due them under their letter of credit No. 1023, for five thousand pounds sterling on the part of Messrs. Flanagan & Son, and we hereby hold ourselves liable for the prompt and complete

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Opinion of the court.

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payment of all amounts that may so become due to them, and for the exact fulfilment of all the conditions mentioned in the annexed receipt:

“NEW YORK, May 25, 1875. ,

“Bills receivable amounting to \$35,089  $\frac{16}{100}$  have been deposited with the Charlottesville National Bank by B. C. Flanagan & Son as collateral security for the within-mentioned credit, in accordance with the resolution of the board of directors, adopted in full board on 14th May, 1875.”

Which guarantee and receipt are signed by the president and cashier of the bank. And the resolution further shows that Flanagan & Son gave plaintiffs the following receipt:

NEW YORK, May 25, '75.

GENTLEMEN: We have received to-day your letter of credit for £5000 on London in our favor, dated to-day, and in consideration thereof we hereby agree that whenever advised of a draft having been drawn under said credit we will receipt your draft, or reimburse you upon your notifying us of the date when due, for the amount of said bills, payable in New York, twenty-one days before the maturity of the bills in London, or their equivalent in cash. We will allow you 2 per cent. banker's commission on the amount of drafts made under the above credit, together with bill stamps, postage, etc., and deposit with you the following collateral, which we authorize you to dispose of at your discretion, in the event of our non-compliance with the above terms.

We further authorize you to cancel this letter of credit at any time to the extent it shall not have been acted upon when notice of revocation is received by the user.

B. C. FLANAGAN & SON.

Drafts were drawn against the letter of credit, in accordance with the agreement, which were ultimately paid by plaintiffs, Flanagan having failed to accept and pay the twenty-one day drafts spoken of in the receipt. The bank failed and was placed in the hands of a receiver by the comptroller of the treasury, and the plaintiffs allege that it is liable upon its above written guarantee for the amount of Flanagan & Son's draft remaining unpaid and held by them.

To this declaration there is a demurrer; all errors in pleading are waived, and the question presented is, whether, upon the facts above set forth, the plaintiffs are entitled to recover.

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Opinion of the court.

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The case is free from many difficulties that have arisen in like cases. It is not a contest against the corporation itself pleading a want of power to make a contract from which it has derived no benefit, but which caused loss to others, such a defence having been justly held by many courts to be as odious as the plea of the statute of limitations on the part of an individual debtor; but it is a contest between creditors claiming the same fund, where each party has the just right to contest the claim of the other in every legal manner.

Nor is there any question of notice to parties, upon which many decisions in the bank cases depend. Here the transaction is in writing chiefly, and stands between the original parties to-day as it did the day it was made. Under these circumstances we are to determine whether or not a national bank is authorized by the statute creating it to guarantee the paper of a customer for his accommodation; for this is the real transaction set forth in the declaration. We will admit for the sake of the argument what plaintiffs' counsel have urged at bar, that a bank may borrow money to aid its customers; but here the bank got no money; none of the money procured by the letter of credit was to go to it. All the bank had to expect was the profit it was to make from the discount it received from the collaterals placed in its hands to secure it from loss by reason of the pledge of its credit to plaintiffs.

The Flanagans were to give their own drafts to take up those drawn against the letter. They agreed what commissions the plaintiffs were to charge. The bank had nothing to do with the transaction except to see in the event of the failure of the Flanagans that the plaintiffs were secure against loss.

What a national bank is authorized to do is defined by the statute of which it is the creature. The section of the statute applicable here is 5136 of the Revised Statutes.

By that section it is authorized to exercise all such powers as are incidental to banking, by discounting and negotiating promissory notes, bills of exchange, and other evidences of debt. But certainly there is no discounting of promissory notes set forth in the declaration.

The cause of action is the written guarantee of the bank. To

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Brief for the plaintiffs.

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discount a note is to deduct the interest *in præsenti* and pay over in money the face value of the note to the holder. Here the bank parted with no money. To negotiate a promissory note is either to buy or sell it, and so with a bill of exchange. Here the bank neither bought or sold any bills of exchange. It agreed to guarantee Flanagan's purchase of them from plaintiffs. By the same section the bank is allowed to lend money upon personal security; but it must be money that it loans, not its credit. Upon the deposit of the collaterals with the defendant by Flanagan, it loaned its credit to him to be used with plaintiffs.

It is alleged, however, that the bank by reason of the powers granted to it incidental to banking, could enter into this contract. But the incidental powers given are not the incidental powers given generally to all banking institutions; but only such as are incidental to banks allowed to do such things as are prescribed by the statute—such acts as are incidental to discounting and negotiating promissory notes and bills of exchange, and the loan of money on personal security, and the other acts of banking mentioned in the statute. We cannot see how this transaction can be brought within the powers of the bank granted by statute, and the demurrer must be sustained.

*Messrs. W. J. Robertson and R. G. H. Kean appeared as counsel for the plaintiffs.*

*Messrs. S. V. Southall and Duke & Duke, for the defendants.*

The briefs of counsel in the case are appended.

*Brief for the Plaintiffs.*

1. The true construction of the transaction, upon the face of the papers set out in the declaration, is, that the proceeds of the letter of credit were to go into the hands of the bank, and were to be used when so realized in discounting from time to time, as realized, so much of the "good business paper" hypothecated by the Flanagans.

2. In this (the true) view of the transaction, the question re-

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 Brief for the plaintiffs.
 

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solves itself into the inquiry whether a national bank can borrow money?

3. It seems to be conceded (as it must be) that, under certain circumstances, a national bank *can* borrow money, *e. g.*, to meet a pressing liability. If so, who is to judge of the emergency? \* Obviously, the *lender* cannot; therefore the question of illegality can only arise between *stockholders* and *officers*.

4. If a national bank can borrow money for legitimate banking purposes this transaction will be sustained, being, in legal effect, a mere method of securing a loan, the proceeds of which were to be used in discounting "business paper."

5. The *subsequent* insolvency of the bank and of B. C. Flanagan & Son in no way affect the legal questions. The receiver stands where the *bank* would if it had not failed. Woods, J., in *Carey v. La Société de Credit Mobilier*, Thompson's National Bank Cases, p. 293.

6. The later view, in England and the United States, frowns on the defence of *ultra vires*, as applied to *executed* contracts, even when the contract is such as, upon a nice construction, would be regarded as beyond the corporate objects. See cases cited in printed note in *Slaughter v. City of Lynchburg*, in 9 Exchequer, L. R. 244; also, *Riche v. Asbury Car Company*, Central Law Journal (article *Ultra Vires*), January 4th, 1878, p. 2, vol. 6; *Houghton v. First National Bank of Elkhorn*, 7 American Cases, 107 (26 Wisconsin, 603); *Bushnell v. Chataqua County Bank*, 10 Hum. 378 (Thompson's National Bank Cases, 794); *Whitney Arms v. Barlow*, 63 New York, 62; *Bissell v. Michigan So. and No. Ind. Railroad Company*, and *Parrish v. Wheeler*, both in 22 New York (8 Smith); *First National Bank of Charlotte v. National Ex. Bank*, etc., 2 Otto, 122 (Thompson's Cases); *Town of Coloma v. Eaves*, 92 U. S. (2 Otto), 484; *Commissioners, etc., v. Bolles*, 94 U. S. (4 Otto), 104. Cases cited in the foregoing.

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\* See opinion of Dillon, J., in *The Public*, October 10th, 1878, page 229. Also, Swayne, J., in *Merchants' National Bank v. State National Bank*, 10 Wallace, 604. "If the contract can be valid under any circumstances, an innocent party in such a case has a right to presume their existence, and the corporation is estopped to deny them." Same case, Thompson's Cases, page 55, for above-quoted expression.

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Brief for the defendant.

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7. When the act complained of has been *executed* and the creditor has parted with his money on the faith of what the corporation has promised, only a substantial adherence to the *purpose* of its creation is required to bind it, although the act might be one which, if *executory*, it might be restrained from engaging in. Coleridge, J., in *E. Co. R. R. Co. v. Hawkes*, 35 E. L. and E., p. 129 ; Comstock, Ch. J., in *Bissell v. R. R. Co.*, and *Painter v. Wheeler*, 22 New York. As to executed contract, *Bushnell v. Chataqua National Bank*, Thompson's Cases, 796.

8. Nothing in the view that the nine per cent. guaranteed was illegal, because—

*First.* The law specifically provides what the penalties of usury shall be.

*Second.* It was never said that the forfeiture of interest should avoid the contract.

*Third.* The bank is estopped to allege its usury practiced on Flanagan & Son as a reason for repudiating its agreement with plaintiffs, who are innocent of all usury. 9 Massachusetts Reports, p. 1.

9. To say that a temporary loan made to tide over a tight time, and protect customers, is an unlawful increase of the *capital stock* is to abuse language. The whole answer is, the thing is not true.

10. There was nothing wrong or vicious in what the plaintiffs did. Their *bona fides* is beyond question. This being so, to enable *the bank* to repudiate its engagement, on the faith of which the plaintiffs parted with their money, it must appear affirmatively that there was no natural and direct connection between the arrangement made and the *purpose* for which the charter was granted.

*Brief for Defendant.*

1. Corporations, created by statute, depend for their powers, and for the mode of exercising them, on the construction of the statute itself. *Bank of United States v. Dandridge*, 12 Wheaton, 64 ; *Head v. Providence Insurance Company*, 1 and 2 Cranch, 127 ; *Fowler v. Scully*, Thompson's Bank Cases, 855 ; *Matthews v. Skinker*, Thompson's Cases, 649.

## Brief for the defendant.

2. A corporation can make no contract and do no act except such as are authorized by its charter, either expressly, or as incidental to its existence. *First National Bank of Lyons v. Ocean National Bank*, Thompson's Cases, 737.

"The express grant of the powers mentioned is, on familiar principles, an implied exclusion of all not mentioned." *Wiley v. First National Bank*, Thompson's Cases, 908.

3. Section 8 of National Banking Act defines and limits the powers of the banks, the powers not granted and not necessary to their existence being prohibited. *Wechler v. Bank of Hagerstown*, Thompson's Cases, 540-542.

"Dealing in stocks is not expressly prohibited; but such a prohibition is implied from the failure to grant the power." *First National Bank of Charlotte v. National Exchange Bank of Baltimore*, 2 Otto, 128 (reported in Thompson's Cases, 129).

4. Accommodation indorsement by banks unauthorized. *Bank of Genesee v. Patchin Bank*, 3 Kernan, 309; *Bank of Kent v. Butchers and Drovers' Bank*, 16 New York, 128, 129; 26 Barbour, 23, 568; 30 Barbour, 421; 1 Daniel N. Y. Notes, 290, 291; Green's Brice's Ultra Vires, 121, 122 (note).

Public policy requires that banks should not lend their credit, whether compensated for it or not; indeed, compensation but increases the evil. If they can guarantee for, or without a consideration, then they can guarantee railroad bonds, city bonds, private bonds, and all bonds, and their liability becomes illimitable.

5. Banks expressly prohibited from guaranteeing or borrowing. Section 5202 of the National Bank Act.

Not only the shareholders, and the depositors, and the local public, but the United States Government itself, and the people represented by it, are interested in maintaining the credit of the banks, hence the restrictions imposed upon them by Congress. *Farmers and Mechanics' Bank v. Dearing*, Thompson's Cases, 117.

6. A person dealing with a corporation is presumed to know the extent of its corporative powers. *Farmers and Mechanics' Bank of Kent v. Butchers and Drovers' Bank*, 16 New York, 129, 130; 21 Howard, 443; 42 Barbour, 488; 3 Wallace.

Hence Seligman *knew* that his transaction was *illegal*. The

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Brief for the defendant.

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court may sympathize with Seligman's loss of his money, and rigidly enforce his remedy, if he has one, against the officers of the bank who exceeded their powers, but that is no reason why the money of either *innocent* depositors or stockholders should be taken to pay Seligman.

7. The Flanagan proposition to the bank, the resolution of the board of directors authorizing the guarantee, and the guarantee itself, as set forth in the declaration, import a simple guarantee by the bank upon the supposed protection of the \$35,000 of business paper (so called) as collateral security.

The bank could not "*receive*" (for purposes of discount) money arising under the Seligman contract, if said Seligman contract was "*used*" to a corresponding extent by the Flanagans themselves.

But suppose it was understood all around that the money raised by the Flanagans on the Seligman contract should be turned over by them to the bank, *provided* it was returned to the Flanagans, as the proceeds of the discount of the business paper, were not the parties precisely where they would have been if the money so raised had remained in the Flanagans' hands, and the bank had been paid by them 2 per cent. for its guarantee? And if this could not be done directly, it could not be done indirectly.

8. Seligman's contract did not contemplate *money* being *received* by either the bank or Flanagan & Son, but only *credit* was to be gotten under it.

9. If the bank was to receive money on the Seligman contract, and discount Flanagan & Son's paper with it, in consideration of guarantee, then consideration *failed*, because Seligman furnished the money to Flanagan & Son (who used it), and not to the bank.

10. If the Seligman contract with the bank's guarantee is to be treated as a re-discount for the bank, then it was a re-discount by Seligman & Co. when they *knew* that the \$35,000 of business paper had not been previously discounted by the bank, and no bank can have paper re-discounted till by discount it becomes the owner of such paper. And the Flanagans, and not the bank,

## Brief for the defendant.

having received the *avails* of the arrangement, the bank is not bound legally or equitably.

And if the Seligman contract with the guarantee is to be treated as Flanagan & Son's note indorsed by the bank, and if it was understood that Seligman should furnish Flanagan & Son the money on it, with the *further* understanding that Flanagan & Son should turn it over to the bank, to be *returned* to them by the bank as the proceeds of the discount of the business paper, then it simply amounted to a lending of the money by Seligman to Flanagan upon the bank's guarantee, which was protected by the business paper as collateral. And if this could not be done directly, it could not be done indirectly.

11. The bank had no power to borrow money to lend again.

12. *Usurious* lending by banks *expressly* prohibited. Seligman rests his case upon Flanagan's proposition, which was a *usurious* one, and, therefore, *illegal*, and, being *illegal*, cannot support Seligman's claim.

13. If a *national* bank has the power to borrow money, it certainly can be done only to meet an emergency, for instance, to raise money to meet a pressing debt, thus merely substituting one creditor for another. But no bank, least of all a *national* bank, can borrow money to lend a customer. To do this is indirectly to increase the capital stock of the bank, which the National Banking Act says cannot be done without the comptroller's consent. Besides, money borrowed by the bank upon the note of its customer, strengthened by its own indorsement, to be lent by it to its customer with the knowledge of the lender to the bank, amounts simply to a direct lending by the creditor to the bank's customer upon his note indorsed for his accommodation by the bank. It is merely an attempted evasion of the prohibition imposed upon the bank against indorsement for the benefit of a third party. See *Leavitt v. Curtis*, 5 Barbour.

14. National banks may "make contracts," but only such contracts as the act contemplates, those belonging to legitimate banking business of the kind prescribed by the statute.

15. The guarantee in this case is so *extraordinary*, that the *seal* of the corporation is annexed to the paper.

16. It is true that the penalty imposed upon a national bank

Opinion of the court.

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for committing usury does not extend to the *principal* of the debt. But it forfeits all the interest, so that the Flanagan proposition legally deprived the bank (if there was really to be anything more than a *pretended* discounting under it) of all the benefit which the plaintiffs say the bank was to get by it, thus leaving the transaction without the semblance of consideration, so far as the bank was concerned.

And, besides, the penalty, though great or small, is imposed because an act *forbidden* has been done, and an act forbidden is *illegal*, and the Seligmans cannot rest their claim upon an act which they *knew* to be *illegal*, an act prohibited by law, and never sanctioned by the shareholders of the bank.

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*United States Circuit Court, Western District of Virginia, at  
Lynchburg, Fall Term, 1879.*

JOHNSTON BROTHERS & Co. v. CHARLOTTESVILLE NATIONAL  
BANK.

Where a party knowingly takes as collateral security drafts of a national bank drawn for the accommodation of a customer, he cannot recover in a suit against the bank in the hands of a receiver.

A national bank has no authority to lend its credit on personal security.

IN assumpsit.

The facts of the case appear in the finding and decision of the court, rendered by

BOND, J.—This cause having been submitted to the court by writing duly executed and filed, waiving the intervention of a jury, as well upon the facts as upon the law, and having been argued by counsel, the court doth find the facts to be as follows:

Johnston Brothers & Co., the plaintiffs, claim to recover against the defendant, the Charlottesville National Bank, upon

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Opinion of the court.

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five bills of exchange in their declaration mentioned. The partners constituting the firm of Johnston Brothers & Co. are citizens of the State of Maryland, and are bankers in the city of Baltimore. The defendant bank was, on the 16th of April, 1875, a banking association and body corporate, carrying on the business of banking at Charlottesville in the State of Virginia, under the provisions of the act of Congress known as the National Bank Act. N. H. Massie was a director and president of the defendant bank. B. C. Flanagan, of the firm of B. C. Flanagan & Son, was also a director, and W. W. Flanagan, also of that firm, was a director and cashier of the bank. Each continued his official relations to the bank until its failure, which occurred about the 28th of October, 1875, when the bank went into the hands of a receiver, in whose hands it now remains.

Prior to the 13th day of April, 1875, the bank had, at sundry times, discounted paper for the Flanagans to an amount aggregating more than \$50,000, which paper at the date first above mentioned had not matured, but much of this paper had been re-discounted for the use of the Bank of Charlottesville by other banks in New York and Baltimore. Flanagan & Son were in straitened circumstances on the 13th day of April, 1875, and though in possession of sundry and numerous bills receivable, they were drawn payable upon such long time that they were available only as collaterals and not for the purpose of present discount in bank. They also had certain bonds designated as Jordan Alum Springs bonds. The Flanagans applied to the defendant bank for a loan of \$25,000, but the bank declined to make such loan, because it was out of funds to do so. On the 13th of April, 1875, Flanagan & Son applied to the plaintiffs for a loan of \$25,000, stating they might have got it from the defendant bank, but it was not in funds. The plaintiffs required them to submit their proposition in writing, which they did in the words following:

We propose to borrow \$25,000 until next fall, say November 20th, and to pledge as collateral for same, say, \$30,000 bills receivable, \$25,000 Jordan Alum Springs ten per cent. bonds. The bills receivable above are given to us for guano and provisions furnished merchants by us, and in many cases are secured to us by a pledge as

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Opinion of the court.

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collateral of planter liens, and indorsed by Flanagan, Abell & Co. The Springs bonds are secured by a first mortgage on all the property, both real and personal. The cost of said property is \$150,000, and the amount of the mortgage is \$60,000. The bonds bear ten per cent. J. Ran. Tucker and John B. Minor are trustees, and the mortgage can be foreclosed on failure to pay interest. We will give our note for same and interest, but will wish any notes which are held as collateral and maturing before maturity of above loan to be credited on same, with rebate of interest. As an alternative, if preferred by you, we believe, by depositing the Springs bonds with the Charlottesville National Bank, we can give its indorsement. It is proper, however, to state the proposition is contingent on the bank's willingness to indorse, which has not been submitted to the directors thereof.

The plaintiffs then took the written proposition under advisement, promising to give notice of its acceptance or non-acceptance in due time, and, accordingly, on the 14th of April, 1875, the plaintiffs addressed to Flanagan & Son the following letter:

BALTIMORE, April 14th, 1875.

MESSRS. B. C. FLANAGAN & SON, Charlottesville, Va.

DEAR SIR: In reply to the memorandum handed us yesterday, we have to say, that we will advance you twenty thousand dollars on the following collaterals: Forty thousand dollars of bills receivable from new and fresh sales of this season (no renewals of old paper to be included), and four drafts of five thousand dollars each of the Charlottesville National Bank on the Citizens' National Bank of this city, payable on the 30th of November next, "acceptance waived," said drafts to be received by us in lieu of the Jordan Alum Springs bonds, which are to be deposited by you with the bank as security for these drafts as above. You forgot to mention in your memorandum the rate of interest and commissions you were willing to pay. If *this* be made *satisfactory*, we will make the advance as herein stated. Perhaps you had better come down in person to conclude the arrangement.

Respectfully,

JOHNSTON BROTHERS & Co.

Upon receipt of this letter, on the 16th day of April, 1875, B. C. Flanagan requested Massie, the president of the Charlottesville Bank, to sign and issue the drafts, that they might use them as collateral security, in part, for the loan from plaintiffs, with which request Massie, the president, on the 16th of April, 1875, complied, without submitting the matter at any time to the

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Opinion of the court.

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board of directors of the bank ; but he required that Flanagan & Son should submit to him a written proposition for the loan, which they did in the following words :

TO N. H. MASSIE, PRESIDENT CHARLOTTESVILLE NATIONAL BANK.

We are greatly in want of certain accommodations to extend some liabilities of our firm until next autumn, and if we can procure them through the aid of this bank will be enabled then to meet them without, we are persuaded, any doubt ; and are able to cover the amount by collateral security in the shape of good business paper not maturing early enough for our present purposes, but of unquestionable solvency and reliability. It is, of course, not worth our while to say to you that our liability in many different ways to the bank, incurred through a course of years in the two banks before their consolidation, partly as principal and partly as indorser, we being ourselves, individually, the owner of a very large part of the stock of both banks, is of such an amount that even the most temporary disaster to us would seriously inconvenience the present bank, even to use no stronger language. What we ask now is aid to the extent of five drafts extending till November, amounting in the aggregate to twenty-five thousand dollars.

Having obtained the bills of exchange, Flanagan & Son, on the 17th of April, called on the plaintiffs at Baltimore, and obtained from them the loan of \$25,000, giving the plaintiffs their promissory note, payable on the 30th of November then next, for the amount of the loan, and interest added, at the rate of eighteen *per centum per annum*, amounting to the sum of \$27,912.50 ; and, as collateral security, indorsed and delivered to the plaintiffs said five bills of exchange, and transferred bills receivable to the amount of \$26,106.24, which last amount they increased to \$46,000 in a month thereafter.

The plaintiffs were aware at the time they received them that at the time of drawing those bills the bank had no funds with which to make discounts, and that, however obtained from Massie, they were to be used by Flanagan & Son as collateral security for the loan made by them.

The plaintiffs were not aware of the arrangements made with Massie by Flanagan & Son to obtain the five bills, except so far as is above stated and by the correspondence between Flanagan and the plaintiffs, and in the application of the 13th of April, 1875, made by Flanagan & Son for a loan.

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Opinion of the court.

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On the 16th day of April, 1875, the "Citizens' National Bank of Baltimore," upon which the five drafts were drawn, was and had been the correspondent bank and reserve redemption agent of the Charlottesville National Bank, keeping two accounts with it: one general account as its correspondent, and another account exclusively pertaining to its redemption agency; and the reserve fund of the Charlottesville Bank remaining in the Citizens' Bank. On the 16th of April, the date of the drafts, there was to the credit of the Charlottesville Bank in the Citizens' Bank, on its reserve account, a balance of \$15,000, but at the same time the Charlottesville Bank owed the Citizens' Bank, upon general account, \$14,088.84, which indebtedness was increased on the 17th of April, 1875, to \$15,337.35; the reserve account remaining as it was.

The bills of exchange were drawn by the Bank of Charlottesville on the Citizens' National Bank of Baltimore, each payable to the order of B. C. Flanagan & Son: the first payable on the 20th of November "fixed;" the second and third were drawn payable on the 25th and 30th days of November "fixed;" and the fourth and fifth were drawn payable on the 6th and 10th days of December "fixed;" and each of said bills was drawn and expressed "acceptance waived."

The word "fixed" in said bills means without grace. Neither of the bills was paid at maturity though presented, and due notice of protest was sent to drawer and indorser. When the money was obtained from the plaintiffs by the Flanagans, it was deposited in the Bank of Charlottesville subject to the order of Flanagan & Son. Neither of said bills was drawn against money actually on deposit to the credit of the Bank of Charlottesville in the Citizens' Bank, nor upon any money thereafter to become due from the Citizens' Bank to the Bank of Charlottesville, upon the maturity of said bills. It was expected by the plaintiffs, and the Charlottesville Bank, and Flanagan & Son, that the latter would protect the drawer from any liability upon the bill by paying their note given to the plaintiffs, as above stated, when the same matured.

And the court finds, further, that it is not in the ordinary course of business, or usual with national banks, to draw time

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Syllabus.

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bills of exchange upon each other without grace, acceptance waived.

And the court finds as matter of law, that upon these facts the issuing of the bills of exchange in question was not a discount, because the Bank of Charlottesville had no funds with which to discount paper presented for discount; but that it was merely a loan of the bank's credit to Flanagan & Son. And it further finds that the plaintiffs, knowing the said drafts or bills of exchange were issued to the Flanagans as collateral security, and that they were drawn for that purpose, it makes no difference whether the same were given to Flanagan & Son for a note deposited by them with the bank at the time, secured by the collateral security or not; the said drafts were but the accommodation paper of the Bank of Charlottesville, and as such were void in the hands of the plaintiffs, who took them with such knowledge of their character.

And the judgment is given for the defendant with his costs.

The same counsel appeared in the foregoing case as appeared in that of *Seligman & Co. v. The Charlottesville National Bank*, next preceding; and in addition,

*Mr. William A. Fisher appeared for the plaintiff,*

*Mr. Charles Case for the defendant.*

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*United States Circuit Court for the Eastern District of Virginia,  
at Richmond, October 31st, 1879.*

M. ROSENBAUM v. E. M. GARNETT, ASSIGNEE IN BANK-  
RUPTCY OF ENGEL & SON.

The Bankrupt Court has summary jurisdiction over all contracts made with itself respecting the bankrupt's property; and where, on the release of goods under seizure, bond is given for their forthcoming or their value, the District Court may, on petition or motion upon notice, order the goods or the value thereof to be brought into court by parties to the bond.

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Opinion of the court.

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PETITION invoking supervisory power of Circuit Court from decree of District Court in bankruptcy. (See *supra*, p. 414.)

The facts are shown in the report of the same case, *supra*, page 414, and in the opinion of the circuit judge, which was as follows :

BOND, J.—It appears that in this case the District Court ordered the marshal, on the 17th of June, 1870, to seize the goods of the bankrupt's which were alleged to be in the possession of one Lisberger. In obedience to this order the marshal took possession of the bankrupt's effects, including such as were alleged to be in the hands of Lisberger. After this seizure Lisberger, upon his petition, had the property so seized restored to him by the District Court, which court required him to give a bond conditioned for the production of this property or the value of it, to abide the future order of the court.

Afterwards a bill in equity was filed, alleging the fraudulent assignment of these same goods by the bankrupt to Lisberger, to which bill Lisberger was a party, and that suit determined the value of the property in question, and that it was not the property of Lisberger, but was the property of the bankrupt. This case having gone first to the Circuit Court (see 1 Hughes, 620), and then to the Supreme Court on appeal, was affirmed by the Circuit Court, and was dismissed by the Supreme Court for the want of prosecution. Supersedeas bonds were given upon the appeals.

It being now determined that the property for which the bond was given to the District Court by Lisberger, in order that what was then in that court's possession might be placed in his, was not Lisberger's but the bankrupt's, the District Court passed an order requiring the parties to this bond to bring into court the ascertained value of the goods which were released to Lisberger when it was given.

From this order of the District Court, the sureties, or one of them, Rosenbaum, appeals to the supervisory jurisdiction of this court, with what justice we cannot see.

There was no time after the filing of the bond in question till now, that the District Court could not, if it feared the safety of goods, have, by its order, required the parties to that bond to

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Opinion of the court.

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bring the released property or its value into court. Lisberger and his sureties on the bond stood in the same relation to the court when put in possession of the property that the marshal did, and it would not be contended that where a marshal was in possession of property by order of the court, the plaintiffs claiming it must sue his bond before they could get them.

This bond was given in a bankrupt case, where the court is authorized by summary proceedings to collect the assets of the bankrupt. It is found now, that those assets are in the hands of the parties to this bond, and the court may proceed against them precisely as if they had them actually in hand; and, if the value of them is ascertained in a suit in which the principal was a party, and the goods themselves are consumed as is the case here, the court may require the payment of the ascertained value.

The fact that Lisberger gave a supersedeas bond in the suit brought to determine the value and title to the goods, no more releases the obligors in this bond to the court than it would release the sureties on the marshal's bond had he remained in possession or surrendered the goods to Lisberger without the order of the court. The Bankrupt Court has summary jurisdiction over all contracts made with itself respecting the bankrupt's property.

We have heard this petition as one made to the supervisory jurisdiction of the Circuit Court, being of opinion that no appeal lies from the order of the District Court requiring the petitioner to produce in court the value of the goods placed by it in the hands of Lisberger upon his responsibility.

It is not a "case in equity," nor "a suit at law," nor "an order rejecting the claim wholly or partially of a creditor," nor "an order allowing such a claim," mentioned in the section of the bankruptcy law granting appeals.

We shall dismiss the petition with costs, and direct the District Court to proceed as it may be advised.

## APPENDIX.

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EDWARD McCRADY, Esq., of the Charleston (South Carolina) bar, has kindly permitted the insertion in this volume of his "INQUIRY INTO THE SUBJECT OF THE TERRITORIAL LIMITS AND JURISDICTION OF THE CIRCUIT AND DISTRICT COURTS OF THE UNITED STATES IN STATES DIVIDED INTO DISTRICTS," which is here inserted as an appendix.

The history of the anomalous and unnecessary class of courts, called "*District Courts with Circuit Court powers*," as presented by Mr. McCrady, forms a curious chapter in the law, and cannot fail to be read with profit by the profession.

Prior to the year 1856, the United States courts for the State of South Carolina were held only in Charleston and Columbia, but upon the elevation of the Hon. A. G. Magrath to the Federal Bench, a court was held under an act of Congress of that year, at Greenville. This court during the four years preceding the war, and since its reopening after the war, has been generally regarded by the profession in the State as the same as the courts which sit in Charleston and Columbia, and writs tested in Charleston have been drawn returnable in Greenville, and writs tested in Greenville returnable in Columbia, and those tested in Columbia returnable again in Charleston; the declarations, etc., following the writs from place to place, and the records of the three courts kept as one.

As this practice has been seriously questioned of late, and as the subject is of general interest to the profession throughout the State, it may not be unprofitable to review the legislation and judicial decisions in relation thereto; to look into the history of the matter, and thus the better to be able to understand the questions which have arisen.

By the Constitution the judicial power of the United States is vested in one Supreme Court, and in such "inferior courts" as Congress may from time to time ordain and establish. In pursuance of this power Congress at its first session (1789, 1 Stat.

73) passed the statute commonly known as the "Judiciary Act," the organic law of the United States courts.

By this act the United States were divided into thirteen districts (§ 2). But these districts it must be remembered were not coincident with the thirteen original States, as they are called; the States of Rhode Island and North Carolina not yet having adopted the Constitution. These districts were "to be limited and called" as therein provided, and the first was "to consist of *that part* of the State of Massachusetts which lies easterly of the State of New Hampshire, to be called Maine District;" another was "to consist of the State of Virginia, *except that part* called the District of Kentucky, and to be called Virginia District;" another "to consist of the *remaining part* of the State of Virginia, to be called Kentucky District;" and another, that with which we are immediately concerned, "to consist of the State of South Carolina, and *to be called South Carolina District.*" The act then goes on (§ 3) to provide "that there be a court called a District Court in each of the afore-mentioned districts, to consist of one judge, who shall reside in the district for which he is appointed, and shall be called a district judge," fixes the times and places of holding the courts, and provides: "that in the districts that have but one place for holding the District Court the records thereof shall be kept at that place, and in districts that have two at that place in each district which the judge shall appoint."

The next section (§ 4) provides, "that the before-mentioned districts, except those of Maine and Kentucky, shall be divided into three circuits, and be called the Eastern, the Middle, and the Southern circuits," the Southern Circuit to consist of the districts of South Carolina and Georgia, and that there shall "be held annually in each district of said circuits two courts, which shall be called Circuit Courts, and which shall consist of any two justices of the Supreme Court and the district judge of such district, any two of whom shall constitute a quorum." This section also provides for the times and places of holding these Circuit Courts; the first session in South Carolina to be held on the 18th May next thereafter, and the next on the 17th October, and alternately at Columbia and Charleston.

The ninth section of this act prescribes the jurisdiction of the District Courts, and the tenth makes special provision for the District Courts of Kentucky and Maine. As these courts present in the very inception of the system "anomalies," as they have

been called, and which are so much complained of, we will quote the section in full:

§ 10. That the District Court in Kentucky District shall besides the jurisdiction aforesaid have jurisdiction of all other causes, except of appeals and writs of error, hereinafter made cognizable in a Circuit Court, and shall proceed therein in the same manner as a Circuit Court; and writs of error and appeals shall lie from decisions therein to the Supreme Court in the same causes as from a Circuit Court to the Supreme Court, and under the same regulation. And the District Court in Maine District shall besides the jurisdiction hereinbefore granted have jurisdiction of all causes, except of appeals and writs of error, hereinafter made cognizable in a Circuit Court, and shall proceed therein in the same manner as a Circuit Court. And writs of error shall lie from decisions therein to the Circuit Court in the District of Massachusetts in the same manner as from other District Courts to their respective Circuit Courts.

The eleventh section goes on to prescribe the jurisdiction of the Circuit Courts, and among other things, provides:

But no person shall be arrested in one district for trial in another in any civil action before a Circuit or District Court. And no civil suit shall be brought before either of said courts against an inhabitant of the United States by any original process in any other district than that whereof he is an inhabitant, or in which he shall be found at the time of serving the writ, etc.

The State of North Carolina having ratified the Constitution November 21st, 1789 (1 Stat. 126) Congress, by an act, June 4th, 1790, gave effect to the Judiciary Act of 1789 in that State, erecting it into a district, to be called North Carolina District, establishing a District Court, and annexing it to the Southern Circuit. And Rhode Island having ratified the Constitution May 29th, 1790, a similar act to give effect to the Judiciary Act was passed by Congress 23d June, 1790 (1 Stat. 128) by which Rhode Island District was annexed to the Eastern Circuit. Vermont, having been admitted in 1791, an act was passed on the 2d of March of that year, giving effect to the laws of the United States, establishing a District Court, and annexing it to the Eastern Circuit. (1 Stat. 197.)

The first instance we have of the division of a State into districts within its own limits is that of North Carolina, in 1794 (1 Stat. 396). By an act of that year that State was divided into three districts. The act was soon repealed—1797 (1 Stat. 518); but there is a provision in it which it is as well in this connection not to overlook. It is as follows:

§ 4. That any person living within either of the districts aforesaid who hereafter shall be arrested by virtue of process issuing out of the court of either of the said Districts other than that in which he shall so reside, shall be discharged therefrom on his entering his appearance and giving bail to the action in the court of the district in which he shall so reside, in like manner and to the like effect as if the said process had originally been issued out of the court within the said last-mentioned district.

The State of Tennessee was admitted 1st June, 1796, and on the 31st January, 1797 (1 Stat. 496) an act was adopted, giving effect to the laws of the United States within the State ; and among other things providing :

§ 2. That the said State shall be one district, to be denominated Tennessee District, and there shall be a District Court therein, to consist of one judge, who shall reside in the said district, and be called a district judge. . . . And the said judge shall in all things have and exercise the same jurisdiction and powers which by law are given to the judge of the District of Kentucky.

“ An act to provide for the more convenient organization of the courts of the United States,” was passed 13th February, 1801 (2 Stat. 89), by which the United States was rearranged into districts and circuits, several States being divided into two districts. This act provided for the appointment of circuit judges as distinct and separate officers, and by it the Circuit Court powers and jurisdiction were taken away from such District Courts as then possessed them, special provision being made by the twentieth section for continuing over the causes then pending in these courts to the respective Circuit Courts.

This act was but short-lived, having been repealed the following year (2 Stat. 132), whereby the courts respectively were remitted to their condition before its passage. We may observe in passing that this act of 1801 also contained the provision that no person should be arrested in one district for trial in another, and that no civil action should be brought by original process against any person in any other district than that whereof he is an inhabitant, or in which he shall be found at the time of serving the writ.

That the repeal of this act revived the jurisdiction of the courts of Kentucky and Maine is clear, not only from the general rule of construction, that by the repeal of a repealing statute the original statute is revived (Dwarris on Statutes, p. 534), but from the subsequent legislation of Congress.

A second act (2 Stat. 156) was passed in the year 1802 in rela-

tion to the subject, entitled "An act to amend the judicial system of the United States," by which the United States was again rearranged into circuits, "excepting the districts of Maine, Kentucky, and Tennessee."

The State of Ohio was admitted in 1803, and the laws of the United States extended to it by an act of that year (2 Stat. 201), by which act it was provided that the State should constitute one district, to be called the Ohio District, and that a District Court should be held therein, to consist of one judge, who should "in all things have and exercise the same jurisdiction and powers, which are by law given to the judge of the Kentucky District." No provision for appeal was made by this act. In 1804 a District Court was established in the Territory of Louisiana (2 Stat. 283), to consist of one judge, who should have and exercise the same jurisdiction and powers which are by law given to, or may be exercised by the judge of Kentucky District. In 1805 an act (2 Stat. 338) was passed providing that certain territorial courts should "have and exercise within their respective territories the same jurisdiction and powers which are by law given to or may be exercised by the District Court of Kentucky District, and writs of error and appeal shall lie from decisions therein to the Supreme Court, for the same causes and under the same regulations, as from the said District Court of Kentucky District."

But not only did Congress thus several times allude to the special jurisdiction of the District Court of Kentucky as still existing, but when it came to establish another circuit to include these States of Kentucky, Tennessee, and Ohio, in 1807, by express enactment (2 Stat. 420), it repeals the powers, authority, and jurisdiction of the Circuit Courts of the United States previously vested in the District Courts of those States.

In 1812 the State of Louisiana was admitted into the Union and the laws of the United States extended to it. By the act of admission (2 Stat. 701), the State with the residue of that portion of country which was comprehended within the Territory of Orleans, was constituted one judicial district, with a district judge, who should "have and exercise the same jurisdiction and powers which . . . were given to the district judge of the Territory of Orleans." No provision for appeals is made by the act.

In 1812 an additional district judge was provided for the District of New York (2 Stat. 719), the judges allotting themselves as they saw fit for the purpose of holding separately the courts, and in 1814 another act, entitled "An act for the better organiza-

tion of the courts of the United States within the State of New York" (3 Stat. 120), was passed, by which the State was divided into two judicial districts, one to be called the Southern District of New York, and the other to be called the Northern District of New York. The last section of this act is as follows :

§ 3. That the Circuit Court of the United States shall be held in and for the said Southern District of New York, at the city of New York, at the time and in the manner now directed by law to be held in and for the District of New York, and that the District Court in the said Northern District of New York shall beside the ordinary jurisdiction of a District Court have jurisdiction of all causes except of appeals and writs of error, cognizable by law in a Circuit Court, and shall proceed therein in the same manner as a Circuit Court, and writs of error shall lie from decisions therein to the Circuit Court in the said Southern District of New York, in the same manner as from other District Courts to their respective Circuit Courts.

In 1815 a supplemental act provided for the appointment of a marshal for the Northern District of New York (3 Stat. 235) ; and in 1818 another provided for the transfer of the records of the causes belonging to the Northern District to the clerk of the court for that district (3 Stat. 413). The last clause of this act of 1818 is significant. It is as follows :

§ 6. That the original jurisdiction of the Circuit Court of the Southern District of New York shall be confined to causes arising within said district, and shall not be *construed* to extend to causes of action arising within the Northern District of New York.

In the same year (1818) Pennsylvania was divided into two judicial districts, to be called respectively the Eastern District and the Western District, and provision made for the appointment of an additional judge for the Western District, the district judge then holding office being assigned by the act to the Eastern District (3 Stat. 462). By this act provision is made in the same words for the larger jurisdiction of the Western District Court, viz. :

§ 4. That the Circuit Court of the United States shall be held for the Eastern District of Pennsylvania at the city of Philadelphia, at the times and in the manner now directed by law to be held for the District of Pennsylvania, and the District Court for the said Western District, in addition to the ordinary jurisdiction and powers of a District Court, shall, within the limits of the said Western District, have jurisdiction of all causes, except of appeals and writs of error cognizable by law in a Circuit Court, and shall proceed therein in the same manner as a Circuit Court, and writs of error shall lie from decisions

therein to the Circuit Court in the said Eastern District of Pennsylvania, in the same manner as from other District Courts to their respective Circuit Courts.

The next year (1819) a certain portion of Virginia was cut off and erected into a judicial district, with circuit jurisdiction conferred in the same language, appeals to lie directly to the Supreme Court. (3 Stat. 478.) The State of Illinois was admitted, the laws of the United States extended to it, and the State constituted a judicial district, whose judge should "in all things have and exercise the same jurisdiction and powers which were by law given to the judge of the Kentucky District," etc. (3 Stat. 502.)

The next legislation (1820) upon the subject was "An act establishing a Circuit Court within and for the District of Maine," which added that district to the first circuit (3 Stat. 554); but Congress did not consider that sufficient to take away the extra jurisdiction the District Court had formerly exercised, but especially provided:

§ 2. That all acts and parts of acts granting said District Court of Maine the powers and jurisdiction of a Circuit Court of the United States be and the same are hereby repealed.

In this year, 1820, Alabama was admitted, the laws of the United States extended to it, and the State constituted a district with a judge having "in all things the same jurisdiction and powers which were by law given to the judge of the Kentucky District." (3 Stat. 564.)

The appeals from the District Court of the Western District of Pennsylvania, by the act of 1818, we have just seen, were given to the Circuit Court for the Eastern District of that State, but, by the act of 1820, this was altered and appeals given directly from the District Court of the Western District to the Supreme Court of the United States. (3 Stat. 598.)

In 1822 Missouri was admitted, created a judicial district, with a judge to whom was given "the same jurisdiction and powers which were by law given to the judge of the Kentucky District," but no provision was made in regard to appeals. (3 Stat. 653.)

In the case of the State of Tennessee a special provision was made by the act of this year, that where suit was brought against two or more citizens of the State of Tennessee, some of whom reside in East and some in West Tennessee, the clerk of the Circuit Court in which the plaintiff might elect to sue might issue duplicate writs, one directed to the marshal of East and the other to the marshal of West Tennessee, each of whom were to execute and return the writs, and when returned to be docketed and pro-

ceeded in to judgment as one case only. (3 Stat. 661.) This act is important as the forerunner of a similar general provision.

This was the state of the statute law upon the subject when, in 1823, an act was passed entitled "*An act to divide the State of South Carolina into two judicial districts.*" (3 Stat. 726.) Prior to this act we find but one judicial decision of the Supreme Court in any way touching the jurisdiction of these courts, and that is the case of *Turner v. The Bank of North America*, 4 Dallas, p. 8 (1799). The case arose upon the description of the assignors of a promissory note, in the declaration, in which they were described, not as citizens of North Carolina, but as "using trade and merchandise in partnership together at Philadelphia or North Carolina." Ellsworth, Chief Justice, in delivering the opinion of the court, says:

A Circuit Court, though an inferior in the language of the Constitution, is not so in the language of the common law, nor are its proceedings subject to the scrutiny of those narrow rules which the caution or jealousy of the Courts of Westminster long applied to courts of that denomination, but are entitled to as liberal intendments or presumptions in favor of their regularity as those of any Supreme Court. A Circuit Court, however, is of *limited jurisdiction*, and has cognizance, not of cases generally, but of a few specially circumstanced, amounting to a small proportion of the cases which an unlimited jurisdiction would embrace. And the fair presumption is (not as with regard to a court of general jurisdiction, that a cause is within its jurisdiction unless the contrary appears, but rather) that a cause is without its jurisdiction till the contrary appears.

The law standing thus at that time, statutory and judicial, the act of 1823 was passed, in these words:

§ 1. *Be it enacted, etc.*, That the State of South Carolina be and the same is hereby divided into two districts in the manner following, that is to say: The districts of Lancaster, Chester, York, Union, Spartanburg, Greenville, Pendleton, Abbeville, Edgefield, Newberry, Laurens, and Fairfield shall compose one district, *to be called the Western District*, and the residue of the State shall form one other district, *to be called the Eastern District*. And the terms of the said District Court for the Eastern District shall be held in Charleston, at such times as they are now by law directed to be holden. And for the trial of all such civil and criminal causes as are by law cognizable in the District Courts of the United States, which may hereafter arise, or be prosecuted, or sued within the said Western District, there shall be one annual session of the said District Court holden at Laurens Court-house, to begin on the second Monday in May, in each year, to be holden by the district judge of the United States of the State of South Carolina, and he is hereby authorized and directed to hold such other special sessions as may be necessary for the dispatch of the causes in the said court, at such time or times as he may deem expedient, and may adjourn such special sessions to any other time previous to a stated session.

This act, it will be observed, while it divided the State into two judicial districts, and directed the times and places for the holding of the District Courts in each, the District Court for the Western District to be held at Laurens on the second Monday in May, and the District Court for the Eastern District at such times as then provided by law, makes no provision whatever for any alteration in regard to the Circuit Court; and it neither added nor included these subdivided districts into the then existing Sixth Circuit (act of 1802), as had been done in the cases of North Carolina and Rhode Island, in 1790 (the former having been included in the Southern and the latter in the Eastern Circuit), Vermont in 1791 (annexed to the Eastern Circuit), nor providing a special circuit jurisdiction for the District Court as in the case of Maine and Kentucky (1789), Tennessee (1797), Ohio (1803), Louisiana (1812), Northern District of New York (1814), Western District of Pennsylvania (1818), Illinois (1819), and of Missouri (1822). But neither did it any way repeal the act of 1802 by which Circuit Courts were to be held at Charleston and Columbia, the result of which would seem to have been that the Circuit Court of the Sixth Circuit retained its jurisdiction in the Eastern District, a place and time for its sitting having been provided by an unrepealed law. But the Circuit Court could not sit in the Western District, for neither time nor place had been fixed by law, nor, indeed, was there any statute in terms authorizing the exercise of its jurisdiction within that district.

The act of 1823 was defective also in other particulars, and among them it was deficient of any provision for the drawing of juries. It is said that Judge Lee, then the district judge, once went to Laurens, but being unable to obtain a jury did not go there again, and so the law in regard to South Carolina remained until the act of 1856, which we must notice presently.

But in the meantime it is as well to follow, as far as we may in the limit of these pages, the legislation of Congress from 1823 to 1856. The States of Arkansas (1836, 5 Stat. 50), Michigan (1837, 5 Stat. 61), Florida (1845, 5 Stat. 788), Texas (1845, 9 Stat. 11), Iowa (1846, 9 Stat. 117), and Wisconsin (1848, 9 Stat. 57), were admitted during that time, and to each the laws of the United States extended, and in each a District Court established, the judge of which should have and exercise the same jurisdiction and power, which were by law given to the judge of the Kentucky District. By act of 1831 (4 Stat. 444) in a single enactment Circuit Court powers were also given in the language of the act of 1789 to the District.

Courts of the Northern District of New York, the Western District of Pennsylvania, the District of Indiana, the District of Illinois, the District of Missouri, the District of Mississippi, the Western District of Louisiana, the Northern District of Alabama, and the Southern District of Alabama.

During this period several changes had been made in the organization of the Circuit Courts.

In 1837 an act was passed rearranging the circuits, but which did not alter the Sixth Circuit, "re-enacting that the districts of South Carolina and Georgia shall constitute the Sixth Circuit." (5 Stat. 176.) This act repeals the power and jurisdiction previously vested, as we have just seen, in the District Courts of Indiana, Illinois, Missouri, Arkansas, the Eastern District of Louisiana, the District of Mississippi, the Northern District of New York, the Western District of Virginia, and the Western District of Pennsylvania, and the districts of Alabama, but it did not repeal the powers and jurisdiction of a Circuit Court, then vested in the District Court of the Western District of Louisiana; on the contrary it provides for the continuance of these powers, directing appeals in the future to be to the Circuit Court in the other district in said State, *instead* of to the Supreme Court as previously provided. Another act was passed in 1842, altering the constitution of some of the circuits, and among them the Sixth, which by it thereafter was composed of the districts of North Carolina, South Carolina, and Georgia. (5 Stat. 507.)

During this time, an act had been passed, and two cases had reached the Supreme Court, which should be particularly noticed.

The act of 1826 (4 Stat. 184) provided:

That all writs of execution, upon any judgment or decree, obtained in any of the District or Circuit Courts of the United States, in any one State, which shall have been, or may hereafter be, divided into two judicial districts, may run and be executed in any part of such State, but shall be issued from and made returnable to the court where the judgment was obtained, any law to the contrary notwithstanding.

The first case was that of *McMicken v. Webb*, 11 Peters, 25, in which Justice Thompson, in delivering the opinion of the court, says:

The question presented by the first plea to the jurisdiction of the court is whether Webb, a citizen of the State of Louisiana, who resided in the Western District of that State, could be sued by a plaintiff, who was a citizen of the State of Ohio, in the District Court of the Eastern District of the State of Louisiana. The residence of Webb being in the Western District of Louisiana could not

affect the jurisdiction of the court. The plea admits that he was a citizen of Louisiana, and the act of Congress gives jurisdiction where the suit is between the citizen of the State where the suit is brought and the citizen of another State; and the division of a State into two or more districts cannot affect the jurisdiction of the court, on account of citizenship. This plea admits that the petition and citation were served upon him in New Orleans, which takes the case out of the prohibition in the Judiciary Act: that no civil suit shall be brought in the courts of the United States against an inhabitant of the United States by any original process in any other district than that whereof he is an inhabitant, *or in which he shall be found at the time of serving the writ.*

Another case of importance, that of *Toland v. Sprague*, 12 Peters, 300, came before the Supreme Court in 1838, in which that court gave construction to section 11 of the Judiciary Act of 1789, in relation to those who are *not inhabitants*, and *not found* in the district.

Mr. Justice Barbour delivered the opinion of the court at great length, and in it he says:

The Judiciary Act has divided the United States into judicial districts. Within these districts a circuit is required to be holden. The Circuit Court of each district sits within and for that district, and is bounded by its local limits. Whatever may be the extent of its jurisdiction over the subject-matter of suits in respect to person and property, it can only be exercised within the limits of the district. Congress might have authorized civil process from any Circuit Court to have run into any State of the Union. It has not done so. It has not, in terms, authorized any original civil process to run into any other district, with the single exception of subpoenas for witnesses within a limited distance. In regard to final process, there are two cases, and two only, in which writs of execution can now by law be served in any other district than that in which judgment was rendered; one in favor of private persons in another district of the same State, and the other in favor of the United States in any part of the United States. We think that the opinion of the Legislature is thus manifested to be, that the process of a Circuit Court cannot be served without the district in which it is established, without the special authority of law therefor.

See also, to the same effect, the case of *Ex parte Peter Graham*, 4 Wash. C. C. Rep. 211, and so in *Sheldon et al. v. Sill*, 8 How. 441, it was said that courts created by statute can have no jurisdiction but such as the statute confers.

Congress, it will thus be seen, in pursuance of its powers under the Constitution, proceeded to devise a judiciary system, and in doing so, after providing for the Supreme Court as required by the Constitution, erected the District Courts as "inferior courts," under (but only under) the terms of that instrument. The juris-

diction, powers, and officers of these courts it prescribes, and makes them *sui juris*, and self-existing. The Supreme Court, under the Constitution, except in a few specified cases, is appellate only in its jurisdiction. The District Courts provided by the Constitution were courts of the largest admiralty and maritime jurisdiction, and of limited civil and criminal jurisdiction. It will be recollected, that the judicial power of the United States extends to controversies between a State and citizens of another State, and between citizens of different States. The object of this provision, it is evident, was to interpose between the States and citizens of other States, and between citizens of different States, an impartial tribunal, one beyond the influence of State prejudices; but the District Court, as provided in the scheme of Congress, is to consist of one judge, who shall reside in the district for which he is appointed (act, 1789), and the jurors to be drawn from the citizens of the State in which the court sits. § 29, *Ibid.* This court thus constituted, Congress did not seem to regard as sufficiently beyond local influences to be intrusted by itself with the protection of the rights of citizens of different States, nor did it see fit to intrust it with jurisdiction of high crimes. Intermediary, therefore, between this court and the Supreme Court, it provided a Circuit Court, having no officers of its own, but constituted by a judge of the District Court for which district it should sit, together with, by the act (1789), any *two* justices of the Supreme Court, and by a subsequent act (1802), by the district judge, and the justice of the Supreme Court residing within the circuit for which the court is holden, except in the Second and Fifth circuits, for which special provision was made.

The Circuit Courts, it will thus be seen, were dependent upon the District Courts, both for their limits and constitution, and for their officers. Their composition is derived both from the Supreme and District Courts, and is independent of neither. We do not forget the act of 1801, giving the Circuit Court powers, jurisdiction, and constitution, *sui juris*; but as that act was never practically in operation, and was so soon repealed, it can scarcely be considered as affecting the question. Of the late act of 1869 we shall speak hereafter. At present we are considering the law as it stood in 1856. From the very inception of the system Congress found itself called upon to provide for districts to which it was inconvenient to extend the Circuit Courts, and special provision was at once made for the Districts of Maine and Kentucky, and this provision was to give to the District Courts

in these districts Circuit Court powers, with appeal from one to the adjoining Circuit; and from the other, directly to the Supreme Court.

This provision was convenient, not only in extending the laws to newly admitted States,—to Tennessee, Ohio, Louisiana, Illinois, and Missouri,—but also in providing for new districts, required by the increasing population, as in the instances of the Northern District of New York and the Western District of Pennsylvania, and it thus, from the origin of the judiciary system, and continuously after, has formed a part of it, and is not an anomaly, as it has been termed.

The condition of the United States courts in South Carolina from 1824 to 1856 certainly was anomalous, for the State had been divided into two districts, which districts were specifically designated by name, but no change had been made in regard to the Circuit Court, for sessions of which the act of 1802, then still in force, provided, at Charleston and Columbia, both of which cities are situated in the Eastern District; but no provision was made for the sitting of the Circuit Court in the Western District. The Circuit Court of the United States thus had a location and jurisdiction in what became under the division, in 1823, the Eastern District; and its jurisdiction once obtained could only be taken away by express enactment.\*

But the Circuit Court had had no such location in the Western District. It could only sit in such place as Congress directed; and as we have seen, it had been seriously questioned whether a citizen of one district could be held to answer in another district of the same State, even though found in the district of which he was not an inhabitant (*McMicken v. Webb*, ante, p. 674); and it had been expressly held that the Circuit Court for each district sits within and for that district, and is bounded by its local limits;

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\* Dwarris on Statutes, 612, quoting Ashurst, J., 4 Term Reports, 109. "Where the Superior Courts have jurisdiction it can only be taken from them by the express words of an act of Parliament, or by necessary implication." And we must recollect that the Circuits are superior courts in the sense of the common law; "inferior" only to the Supreme Court as the term is used in the Constitution. *Turner v. The Bank of North America*, ante, p. 672. Dwarris also refers to the opinion of Tindal, C. J., 8 Bingham, 394, to which we shall have occasion presently to refer.

But directly in point is the decision of the Supreme Court, in the case of *The United States v. Dawson*, 15 Howard, 467, post, in which it was held in regard to the State of Arkansas, that the Circuit Court under similar legislation retained its jurisdiction over the diminished territory.

and that "whatever may be the extent of its jurisdiction over the subject-matter of suits in respect of persons and property, it can only be exercised within the limits of the district." *Toland v. Sprague*, ante, p. 675.

In 1837 another rearrangement of the districts of the United States into circuits was made, but in regard to this State the act merely declared that "the districts of South Carolina and Georgia shall constitute the Sixth Circuit," and did not provide for a session of the Circuit Court for the Western District of the State of South Carolina. (5 Stat. 176.)

The State of Arkansas had been admitted in 1836, created a "district," and a judge provided with the powers and jurisdiction which were by law given to the judge of the Kentucky District. In 1844 this court was invested with jurisdiction over the Indian Territory adjoining, and in 1851 Arkansas and the Indian Territory were divided into two districts; certain counties of the State and the Indian Territory lying within the then present judicial district of Arkansas were constituted a new judicial district, to be styled the Western District of Arkansas, the residue of the State to remain a judicial district, to be styled the Eastern District of Arkansas. This act dividing Arkansas into judicial districts (9 Stat. 594) is very similar to that dividing the State of South Carolina. It divides the State into two districts; directs that the judge of the District Court of Arkansas shall hold certain terms of said (that is Western) court, but does not provide for the drawing of juries or for terms of the circuit in either district. It, however, unlike our act of 1824, at once gave, as was afterwards done in our act of 1856, the Circuit Court powers to the new District Court, and it also provided, what was done by neither of our acts, for the appointment of a district attorney and marshal for the Western District.

It so happened that at the time of the passage of this act dividing the State of Arkansas into two districts, there were certain prisoners under indictment in the Circuit Court for the "District of Arkansas" for murder committed in that portion of the former district then constituting the Western District. The Circuit Court for the Eastern District, however, retaining the records of the circuit for the former "District of Arkansas," proceeded with the trial of the prisoners, whereupon a motion was made to quash the indictment for want of jurisdiction, inasmuch as it appeared that the crime was committed in what had since become

another district, and that the defendant could under the 6th amendment to the Constitution only be tried "by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law." But the Supreme Court held that the court for the Eastern District had rightly acquired jurisdiction, and that having done so the change in the districts did not take away jurisdiction of the cases pending before it. *United States v. Dawson*, 15 How. 467.

Mr. Justice Nelson delivered the opinion of the court, and in it he says, p. 486 :

It will be seen on a careful perusal of this act that it simply erects a new judicial district out of nine of the Western counties in the State, together with the Indian country, and confers on the district judge, besides the jurisdiction already possessed, Circuit Court powers within the district, subject to the limitation as to appeals and writs of error, leaving the powers and jurisdiction of the Circuit and District Courts as they existed in the remaining portion of the State untouched. These remain and continue within the district after the change the same as before, the only effect being to restrict the territory over which the jurisdiction extends. Hence no provision is made as to the time or place of holding the Circuit or District Courts in the district, or in respect to the officers of the courts, such as district attorney, marshal, or clerk, or for organizing the courts for the dispatch of their business. These are all provided for under the old organization.

The point decided by the court, it will be observed, was that the Circuit Court for the Eastern District, having once *obtained* jurisdiction, it was not ousted by the diminution of its limits. But even against this there was strong dissent. Mr. Justice McLean, p. 491, dissenting, says :

The establishment of the Western District in effect repealed the jurisdiction of the Eastern District, as to causes of action arising in the Western District, as fully as if the law had declared "no jurisdiction shall hereafter be taken in any case, civil or criminal, which is of a local character, and arises in the Western District." Offences committed in that district are made local by the acts of Congress. This is not a case where, if jurisdiction once attaches, the court may finally determine the matter. There seems to be no reason for such a rule in a criminal case, especially when it is opposed to the policy of the Constitution, and to the principles of the common law. . .

All this difficulty arises from an omission of Congress to make in the law dividing the district the necessary provision, and it appears to me that we have no power, by construction or otherwise, to supply the omission. This could not be done in an action of ejectment. A writ of possession in such a case could not be issued to the Western District on a judgment entered in the

Eastern. And if such a jurisdiction could not be sustained in a civil action, much less could it be sustained in a criminal case.

If a person, guilty of a crime in the Indian country before the division, could not be indicted and tried in the Eastern District, it follows that the fact of the crime having been committed in the Indian country can afford no ground of jurisdiction in the present case. It must rest alone then, it would seem, for jurisdiction on the ground that the indictment, having been found in the Eastern District, the same jurisdiction may try the defendants, and, if found guilty, sentence them to be executed. This view must overcome the locality of the crime, and the right which the defendant may claim to have a jury as near the vicinage as practicable, at least a jury from the district where the crime was committed. These appear to me to be objections entitled to great consideration. A jurisdiction in so important a case should not be maintained under reasonable doubt of its legality.

The result of the same omission in the act dividing this State, appears to us to have been that during the period from 1823, when the division was made, and 1856, when the act next mentioned was passed, the Western District was deprived of the jurisdiction of the Circuit Court, because Congress had not provided a place for its sitting in that district; nor conferred upon it Circuit Court powers, and so, also, it was deprived of the benefit of the District Court by the omission of Congress to provide for the drawing of juries for the Western District. But it is probable that, in the isolation of that part of the State, and the simplicity of the times, that the want was not much felt, as the remedy was so simple under the previous legislation of Congress, and so easily obtained when asked for. This was done in 1856; and Congress, to provide for this district, had two courses open to it: one was, as in the cases of North Carolina and Rhode Island upon their admission in 1790, and of Vermont in 1791, to annex it to the Sixth Circuit, or, if special enactment for that purpose should be considered unnecessary, simply to provide for the sitting of the court in some places in that district; the other was to follow the precedent first established in the cases of Maine and Kentucky districts, and, with the exception of the three States just mentioned, not only followed upon the admission of every new State up to that time, but applied in every instance (except in that of North Carolina) in which a State had been divided into districts.

The act, passed in August, 1856, is as follows:

*Be it enacted*, That so much of the act of Congress, passed the 25th May, eighteen hundred and twenty-four, as provides for holding the District Court of the United States at Laurens Court-house, South Carolina, on the Tuesday next ensuing after the adjournment of the Circuit Court of the United States at Co-

lumbia, be and the same is hereby repealed, and that in place thereof the said court shall be holden at Greenville Court-house, South Carolina, on the first Monday in August in each year.

SEC. 2. *And be it further enacted*, That the jurors for the said court, grand as well as petit, be drawn from the inhabitants of Greenville District, South Carolina, who are, or may be liable, according to the laws of South Carolina, to do jury duty in the courts of law in the said State, and that the jurors to be drawn, for the first term of the said court, shall be drawn at the term of the District Court, to be holden in the city of Charleston, provided that they shall be drawn at least ninety days previous to the time appointed for holding the said court at Greenville, but from and after the holding of the first term of the said court, all jurors for the next succeeding term shall be drawn at Greenville during the sitting of the said court.

SEC. 3. *And be it further enacted*, That the said District Court, for Greenville, in addition to the ordinary jurisdiction and powers of a District Court of the United States, shall have jurisdiction of all causes (except appeals and writs of error) which now are, or may be hereafter made cognizable in a Circuit Court of the United States, and shall proceed in the same manner as a Circuit Court. (11 Stat. 43.)

Whatever questions existed before this act in regard to the jurisdiction of the Circuit Court in and for the State of South Carolina, were intended it would be supposed to be settled by it, conferring as it did upon the District Court for the Western District, Circuit Court powers, *instead* of providing sessions of the Circuit Court in that district. But as if to add still more to the confusion previously existing upon its passage, the Circuit Court sitting at Charleston adjourned to Greenville; sat there under this act, and adjourned to Columbia, taking along the records and business before it from court to court, regardless of territorial limits. This practice continued some three or four terms, until the United States courts were closed by the war, and was resumed upon their reopening. We now have the question forced upon us: Is this practice correct?

To understand this question is the purpose of this paper, and the preceding review of the law has been made to enable us to do so.

From time to time, doubts have been entertained by members of the bar in regard to this practice, but the first instance in which it was openly expressed, and then only as a doubt, was by Mr. Reverdy Johnson in objecting to a *venire* to summon additional grand and petit jurors from "the body of the district," in which terms the whole State was intended, regardless of the division into districts, to serve in the Circuit Court sitting at Columbia on the trial of prisoners, under the "Enforcement Act." In answer to

Mr. Johnson's doubt the district attorney replied (Report Ku-Klux Trials, p. 8):

If the court please, the State of South Carolina is divided into two districts for the purpose of the District Court. Those districts are called Eastern and Western. The Western District consists of the counties of Lancaster, Chester, York, Union, Spartanburg, Greenville, Pendleton (since divided by the Legislature), Abbeville, Edgefield, Newberry, Laurens, and Fairfield; the remainder of the State constitutes the Eastern District.

For the purposes of the Circuit Court the State of South Carolina, *in toto*, constitutes a district, and these parties being on trial in the Circuit Court, it seems to me that the true and proper construction is that the jury should be drawn from the body of the district, which is the State.

The constitutional point made is undoubtedly true, but what constitutes the district? That is the only question. In 1 Brightly's Digest, p. 844, we find:

"The Sixth Circuit Court of the United States, for the District of South Carolina (since changed to the Fourth), which is required by law to be holden on the second Monday in December annually, shall hereafter be holden on the fourth Monday in November annually." . . .

I think, may it please the court, that there can be no mistake about this matter. The position of the gentleman would be entirely correct if we were in the District Court, but when we come to a court that comprehends the whole State in its jurisdiction, then the juries should be drawn from that district.

We will only observe here that the district attorney appears to have had in court only Brightly's Digest, a work which for its purposes all lawyers who consult it have sufficient reason to value, but which is scarcely to be quoted, in the place of the statute itself, when the point involved is the use of the singular or plural of a noun in the text—the presence or absence of a single letter.

Mr. Johnson seemed very uncertain of his point, as well he might be, unfamiliar as he necessarily was with the statutory provisions in relation to the State of South Carolina; and admitting, "It is true that the Circuit Court has jurisdiction as a court over the entire District of South Carolina," goes on to insist that still the jury must be drawn from the "district" in which the offence was committed. (Ibid. p. 9.)

Judge Bond doubted the quotations, for he asks:

"Mr. Corbin, have you the act of Congress that establishes the Fourth Judicial Circuit?"

To which the district attorney replies:

"The act of 1862, if the court pleases, establishes the circuit: 'Hereafter

the districts of Maryland, Delaware, Virginia, and North Carolina shall constitute the Fourth Circuit; the districts of South Carolina, Georgia, Alabama, Mississippi, and Florida shall constitute the Fifth Circuit.'”

But he adds :

“If the court please, in an act still later, which puts South Carolina in the Fourth Circuit, it is spoken of as the ‘District of South Carolina.’” (Ibid., pp. 9, 10.)

The district attorney must surely still have been quoting from some index or digest, for the act of 1866 mentioned by him “as a still later act,” provides that the “*districts* of Maryland, West Virginia, Virginia, North Carolina, and South Carolina shall constitute the Fourth Circuit.” (14 Stat. 209.)

It is scarcely to be wondered that under this advisement of counsel, his honor Judge Bond should have held, “that, so far as the Circuit Court is concerned, there is but one district in South Carolina.”

But it will be observed, that to get rid of the question in this way is but to substitute one supposed anomaly for another. For it is to declare that, for the State of South Carolina, there is *one* district for the Circuit Court, but *two* districts for the District Court, a condition of things found in no State or Territory, at any time, in the history of the courts of the United States—without judicial precedent or statutory authority.\* Not only so. Some such suggestion, it is probable, was made in regard to the division of the State of New York, in 1814 (*ante*, p. 669); for we recollect that by an act of 1818 (*ante*, p. 670) Congress construed this act for itself, and declared that the original jurisdiction of the Circuit Court of the Southern District of New York shall be confined to causes arising within said district, and shall not be *construed* to extend to causes of action arising within the Northern District of New York. This court, it will be remembered, had appellate jurisdiction from the District Court of the Northern District of New York. Surely Congress, when it said that in one instance an act should not be *construed* in a par-

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\* This was undoubtedly true when his honor Judge Bond made his ruling, but my attention has been called to an act of 3d March, 1873, c. 223, ss. 2, 4, v. 17, pp. 484–488, Rev. Stat. 106, by which such a *statutory* provision has since been made in regard to the courts of Alabama, viz.: one Circuit Court for the three districts of that State. See *Ex parte Insurance Company*, 18 Wallace, 417.—E. McC., Jr.

ticular way, did not intend the forbidden construction to be put upon the same words, when subsequently employed in regard to another State. It construed its own language in the one instance, and that construction must be accepted in other like cases.\*

But Mr. Conkling, in his treatise on the jurisdiction of the United States courts (2d edition, 1864, p. 265), suggests that it may be thought that the acts of 1862 and 1863, rearranging the districts into circuits, intended to extend the circuits over all the districts, whether possessing ordinary or extraordinary jurisdiction, and it is also said that the object of the act of 1869, providing for Circuit Court judges, was to bring all the districts within one homogeneous system, by which these District Courts, with extraordinary powers, were intended to be superseded. The rule we have already seen to be, where a court, such as these, has had and taken jurisdiction, it can only be taken from it by express words or necessary implication (*ante*, p. 677), and Congress it is evident contemplated no such effect from its enactments.

Mr. Conkling has shown that no such effect was proposed by the acts of 1862 and 1863, discriminating as it did between certain District Courts, which had these extraordinary powers, and others; taking from some, by name and in terms, these powers and jurisdiction, and remaining silent as to others.

He observes, however, that it appears improbable that Congress designed to leave the courts for the six districts, as to which the act of 1862 is silent (among them that for the Western District of South Carolina), in possession of their extraordinary jurisdiction; but that the supposition of an assumption by Congress that the introduction of Circuit Courts into those districts would, by implication, deprive those District Courts of their jurisdiction seems still more objectionable, as such an assumption would impute to Congress inconsistency. The most probable explanation, he suggests, is that the fact of the possession of these courts with extraordinary jurisdiction was overlooked. We do not believe that it was.

The Circuit Courts were not introduced into those districts, but

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\* § 8. Where words are general, and a statute only declaratory of the common law, it shall extend to all others besides the persons or things named. The stronger cases only are put, the weaker included; thus where the King's Bench only is mentioned, the provision was held to extend to the other principal courts. Dwarri's Stat. 605.

the District Courts with Circuit Court jurisdiction retained their Circuit Court jurisdiction within their territorial limits.\*

Nor is there any ground for charging Congress with overlooking these District Courts with extraordinary powers. These courts had been devised in the inception of the judicial system as a part of it. Their extraordinary powers had been by a solemn enactment again and again conferred, and, whenever Congress saw fit, withdrawn. They were too numerous and presented too important a part of the system to have been overlooked. Indeed, by the familiar maxim, *expressio unius exclusio alterius*, the repeal in specified instances confirmed the jurisdiction in the remaining cases.

There is a much plainer reason for the action of Congress. It withdrew the Circuit Court powers from the District Courts wherever it was practicable to provide a justice of the Supreme Court to sit occasionally in a Circuit Court, but where that was impracticable it left the District Court with its Circuit Court jurisdiction.

But we are now enabled to show by express legislation, that Congress did not consider that by the acts of 1862 and 1863 it had taken away this jurisdiction, any more than it had by the acts of 1802 and 1837 rearranging the circuits.

The most cursory perusal of the act of 1869 for the appointment of circuit judges will show that there is not a word in it that can be construed to repeal the powers and jurisdiction of any court. It enacts:

§ 2. That for each of the nine *existing* judicial circuits there shall be appointed a circuit judge who shall reside in his circuit, etc.

But Congress has been even more explicit. By act of July 1st, 1870, it has declared:

That nothing in the act to amend the judicial system of the United States, approved April tenth, eighteen hundred and sixty-nine, shall be construed to require a Circuit Court to be held in any judicial district in which a *Circuit Court was not required to be held by previously existing law*. (16 Stat., p. 179.)

And consistently with this legislation, in 1872 an act was passed repealing the Circuit Court jurisdiction previously granted to the Northern District of Georgia, and providing that that district

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\* See *Toland v. Sprague*, and act of 1818 construing the act of 1814, dividing the State of New York, *ante*, p. 670.

should thereafter be attached to the same circuit as that to which the Southern District should be assigned. (Stat. 17, p. 218.)

The Supreme Court certainly does not consider that the Circuit Court jurisdiction had been taken from the District Courts upon which it had been conferred prior to December, 1870, for in revising its rules at that time it provides, Rule No. 8, section 3:

Whenever it shall be necessary or proper in the opinion of the presiding judge in any Circuit Court, or *District Court exercising Circuit Court jurisdiction*, that original papers should be inspected in this court upon appeal or writ of error, such presiding judge shall make such rule or order, etc.

But not only did the jurisdiction of these District Courts, with Circuit Court powers, continue, unless taken away by express enactment, but it was exclusive of the Circuit Court within its jurisdiction. Upon this point we have already (*ante*, p. 677) cited *Dwarris on Statutes*, but the case there cited is more in point than the text of that work.

It will be recollected that by the act dividing the State of South Carolina into two judicial districts, it is provided:

“And for the trial of all such civil and criminal causes as are by law cognizable in the District Courts of the United States, which may hereafter arise or be prosecuted, or sued within the said Western District, there *shall be* one annual session of the said District Court, holden at Laurens Court-house, to begin, etc.,” and that the subsequent act conferring Circuit Court powers, provided “that the said District Court for Greenville, in addition to the ordinary jurisdiction and powers of a District Court, *shall* have jurisdiction of all cases which now are, or may be hereafter made cognizable in a Circuit Court of the United States,” etc.

Now in the case referred to by *Dwarris*, 612 (*Crisp v. Bunbury*, 8 Bing. 394), it was provided by statute, 9 Geo. 4, that in case any dispute should arise between certain institutions, or any person acting for them, etc., “that the matter so in dispute *shall* be referred to the arbitration of certain persons therein designated;” and it was contended on the part of the defendants, that the enactment was imperative upon the plaintiff, taking away the jurisdiction of the courts of common law, and leaving the party who complains no other mode of determining his claim than that which was pointed out and provided by the act. The plaintiff insisted that though his case fell within the purview of the act, the jurisdiction of the courts of common law was not ousted by the words of the statute, which only created a concurrent, and not an

exclusive jurisdiction. But the court held, Tindal, C. J., delivering the opinion, that the plaintiff was barred from maintaining the action in the court of common law, and must pursue the remedy provided by the statute.

The act of 1823 provides that there shall be an annual session of the District Court, for the Western District, for the trial of *all* such civil and criminal causes as are by law cognizable in that court, and the act of 1856, that that court *shall have* jurisdiction of all cases cognizable in a Circuit Court. Under the rule of construction in *Crisp v. Bunbury*, independent of the statutory limits of the Circuit Courts, these provisions appear to preclude the exercise of jurisdiction by any other court of the United States in the Western District.

But it is said that the court for this district is anomalous in another respect; that it contains no provision for appeal, either to an adjourning Circuit Court, as in the case of the Maine District, or directly to the Supreme Court, as in the case of the Kentucky District. The same omission, if omission it may be called, occurred in the acts constituting the like courts for the districts of Tennessee, Ohio, Louisiana, Illinois, Alabama, Missouri, Arkansas, Michigan, Florida, Wisconsin, and Iowa, and its effect was fully considered by the Supreme Court in the case of the District Court of New Orleans, prior to all these acts but those constituting the Districts of Tennessee and Ohio.

In 1810, in the case of *Durouseau v. The United States*, 6 Cranch, 307, the attorney-general, Mr. Rodney, demurred to the appellate jurisdiction of the Supreme Court from the District of New Orleans, which it will be recollected was a similar court to that of the Western District of the State, because it had not been provided by the act organizing that court that appeals should lie to any other.

Chief Justice Marshall, delivering the opinion, held that the appellate powers of the Supreme Court are given by the Constitution, and are only limited and regulated by the Judiciary and other acts upon the subject, and its appellate powers extend to every case not expressly excepted by Congress under its constitutional power. The demurrer was overruled and the appeal heard, the Chief Justice observing that the Supreme Court had previously taken jurisdiction of a cause, brought by writ of error from Tennessee, but that the question was not then moved, and consequently was open. But after this decision (*Durouseau v. The United States*) the reports of the Supreme Court are full of appeals

from, and writs of error to, District Courts with circuit jurisdiction, in the organization of which no provision was made for appeal.

It may be observed, however, that in the case of the New Orleans Court, its Circuit Court jurisdiction had been conferred by declaring that its judge "shall in all things have and exercise the same jurisdiction and powers which are by law given to, or may be exercised by, the District Court of the Kentucky District," whereas, in the act conferring that jurisdiction upon the District Court for the Western District of South Carolina, the jurisdiction and powers of the judge of the Kentucky District are not referred to in terms; but the same language is used in the act of 1856 to confer those powers upon the District Court of the Western District of South Carolina, as had been employed by the act of 1789 in conferring them upon the Kentucky Court. The ruling in the case of *Durouseau v. The United States* applies therefore to the District Court of the Western District of South Carolina as well, and appeals lie from it directly to the Supreme Court of the United States.

It will be recollected that by the organic law of the courts of the United States (October, 1789), no person could be arrested or sued in any other district than that of which he was an inhabitant, or in which he was found at the time of serving the writ, and that the process of the Circuit and District Courts could not run beyond the territorial limits of the *district* for which the court (Circuit or District) sat. *Toland v. Sprague, ante*, p. 675. In the case of the districts of East and West Tennessee, we saw this rule somewhat modified by act of 1822, provision being made in regard to those districts, that where suit was brought against two or more citizens of that State, some of whom resided in one district and some in another, that the party suing might elect in which district he would sue; and that the clerk might issue duplicate writs to the marshal of the other, returnable, however, to the court from which it issued. This provision has since, by act of 1858, been extended to all States containing two or more districts; the plaintiff in *transitory* actions having the right in such cases to elect in which district he will sue, and to a duplicate writ to be served upon the defendants residing in the other; and in cases of a *local* nature, the plaintiff having the right to process upon a defendant residing in another district than the *locus in quo*. (11 Stat. 272.)

From the preceding review of the history of the courts of the United States, it appears that Congress, in "ordaining and estab-

lishing" a system for the exercise of the judicial power of the United States in pursuance of the Constitution, provided for the organization of the Supreme Court as prescribed, and for the District Courts as "inferior courts," within the language of that instrument. That these courts were at first entirely distinct and separate, having each its own judge, clerk, marshal, and other officials; each existing *sui juris*. Upon this as the basis of the system was constituted the Circuit Courts, composed of members of both Supreme and District Courts, but having no officers of their own, nor independent existence, and having a more general jurisdiction, limited as to persons, but unlimited as to causes, and which jurisdiction within its limits was both original and appellate.

But from the very first, it was found impracticable to provide the Circuit Courts for certain districts, and as the exercise of their powers and jurisdiction, though limited, was an essential part of the plan ordained, the scheme was devised of conferring upon the District Courts for such districts, the necessary Circuit Court powers, with appeals either to an adjoining Circuit, or directly to the Supreme Court.

This scheme, adopted in the first instance for the outlying districts of Maine and Kentucky, was found convenient in application to the new States as they were, from time to time, admitted, and, with the exception of North Carolina, Rhode Island, and Vermont, has been applied to each State coming into the Union, as the laws of the United States have been extended to it; and also to new districts carved out of others, as in the case of the Northern District of New York, the Western District of Pennsylvania, and many others, including the Western District of this State.

In a few instances the appeals from these District Courts were given to the adjoining Circuit Courts, as in the instance of Maine and the Western District of Pennsylvania; but in the case of Kentucky it was given directly to the Supreme Court, and as in almost every other instance special jurisdiction was conferred either by reference to the Kentucky act, or, in the language of that act, the appeal, as we have seen (*Durouseau v. The United States*), lies directly to the Supreme Court.

In the State of South Carolina, we have, therefore, three distinct United States courts: one District Court for the Eastern District, and one District Court for the Western District (which latter has Circuit Court jurisdiction and from which appeals lie directly to the Supreme Court), and a Circuit Court for the East-

ern District; each of which are separate and distinct. The records of the District Court for the Eastern District have, under the act of 1789, been kept at Charleston, one of the two places of holding the court for that district; the records for the Western District it appears should, under that act, be kept at Greenville, the only place for holding the court in that district. The two districts are distinct, and each court sitting in them, Circuit and District, is bounded in its jurisdiction by the territorial limits of the district for which it sits, and unable to send its process into the other save in accordance with the act of 1858, or its execution save in accordance with the act of 1826.

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### THE ARLINGTON CASE.

THE following very interesting and learned letter received from a distinguished jurist of the great West, presents views which were not suggested at the trial of the case. The profession will doubtless be gratified at the perusal of them.

———, September 25th, 1879.

MY DEAR JUDGE: I thank you very much for your opinion in the *Arlington Case*, and the brief of Mr. Willoughby, which I have just read with care.

In my judgment, your view as to the suggestion and demurrer of the attorney-general of the United States is unanswerable. It cannot be reversed by the Supreme Court without . . . . . The cardinal principle of English freedom is that the people always stand between the government and the subject. They are the mighty sentinels to guard against the usurpations of government. The great secret is twelve men *in pais*, and twelve men in a box in a court of record. No other nation has ever had so fine a contrivance to check tyranny. The same sentence in Magna Charta protects life, liberty, and *land*: “Nullus liber homo capiatur vel imprisonetur aut *dissaisiatur* de aliquo *libero tenemento* . . . . . nec super eum *ibimus* . . . . nisi per legale iudicium parium suorum vel per legem terræ.” Now in the *Dartmouth College Case*

the statute of a State or an act of Congress cannot be a warrant for the emissary of a State, or an agent or tax commissioner of the President or Congress, to "*enter upon*" the freehold of any man, "*aliquo libero tenemento.*" King John swore that he would not *enter upon* any subject's freehold without the judgment of his peers and the law of the land. Notice the primary force of *ibimus*, meaning *actual entry*, not only on the possession but the *freehold*. A private tortfeasor might enter upon a *vacant* possession, but the king could not, for he promised in Magna Charta to his people that he would not. A private trespasser could enter wrongfully and hold adversely until wrong ripened into title, but the king could do no wrong, and could commit no trespass, and could never, to use the vigorous American expression, *squat* on his subject's freehold. Hence the government has no right to the statute of limitations, because that is founded upon *adverse possession without right*, nor will it suffer its rights to be destroyed by it, for it claims the sovereign right of *nullum tempus occurrit reipublicæ*. A citizen may squat, but not the government of the United States, because government is a trustee to protect the lives and properties of the people, and the trustee of an express trust cannot wrongfully enter upon the land of the *cestui que trust* and then claim it by pleading the statute of limitations.

The glaring fallacy of Mr. Willoughby's elaborate argument is in the misconception by which he assumes that the tax-deed is a *record*, and the tax-title of the United States to Arlington is "*a claim of title of record valid upon its face*" (see Brief, page 44). A tax-deed may be *registered* or *enrolled* by order of the legislature, but it is not a *record* in the proper sense of the word. Such a confusion in the use of this word leads to very false conclusions by Mr. Willoughby. It results in an absurd proposition, which may be stated thus: The government of the United States may tax the lands of a belligerent enemy; it may hang him or destroy him if he come in person to pay the tax. If he does not, it may sell the land by an *ex parte* proceeding; it may refuse to accept the tax by any other hand than that of the proscribed owner; it may order a revenue commissioner to sell the land, make a deed for it to itself, call that deed a *record*! refuse to let the judiciary look into the legality of the proceedings, put troops into possession, deny the jurisdiction of its own courts, and hold the property in full dominion and sovereignty without law, above law, and in defiance of the constitutional guarantees enjoyed in England by the subject, and promised by the Constitution to citizens in America.

By the British law the king was entitled to common-law actions, but there were more efficacious and rapid remedies than the writ of right, ejectment, or trespass, to try title, for any intrusions upon the royal domain. The king could not enter upon the freehold of the subject without an inquest of office directed to his sheriff, coroner, or escheator, showing by their verdicts that the king was *entitled*. This inquiry was in the nature of a presentment by a grand jury in cases affecting life or liberty. In a word, the king could not, by a law officer or one of his creatures, commence a prosecution against a subject for an alleged crime, without the previous permission of the people through their jury. He could not, as in France, proceed directly by an "*acte d'accusation*" of the crown lawyer, either against the person or property of the subject. Hence the "*Inquests of Entitling*," as they were called technically, were conditions precedent to all legal proceedings, to criminal prosecutions, or to proceedings to divest the subject's title to his lands or possession of his freehold. If the jury of the vicinage refused to find an office for the crown the king was paralyzed in his cupidity. See *Nichols v. Nichols*, 2 Plowden, 485; *Fairfax v. Hunter*, 7 Cranch, 603; from Virginia, annulling the statute of Virginia, before the Constitution was accepted, and followed in Kentucky in regard to sales of lands for taxes, in *Robinson v. Haff*, 3 Littell, 38, 1 Littell, Ky. Rep., 60, and the recent case of *Marshall* (I think) v. ———, 12 Bush's Ky. Rep., which reaffirms the principle of *Fairfax v. Hunter*, that there can be no entry by government on the freehold of the citizen without *office found*.

All these cases rest upon the principle that these inquests of office, *entitling* the government to enter upon the freehold of the citizen, were devised by law to preclude the authorities from taking the property of the people at the royal pleasure. Can any one imagine a more hopeless despotism than a country governed upon the theory advanced by Mr. Willoughby. A country where the government can pass a law, execute it by the executive alone, without any responsibility to the courts, and then plead, no, not plead, but haughtily suggest that it *will not submit* to the jurisdiction of its own courts, nor open them to the people or the plundered owners, and suggest that any such inquiry would be impertinent and unauthorized!!!

The process of reasoning indulged in by Mr. Willoughby is circuitous. It is, in substance, that if the government obtains actual possession, under its own act, then, that the possession is

conclusive proof of the lawfulness of the entry. This circular logic is confusing. George Jeffries never pressed the prerogative of the king to the length claimed for the President by the attorney-general of the United States in the *Arlington Case*.

But I intended only to write a note of thanks, my dear Judge, for your courtesy in sending me your opinion. I admire the reasoning by which you so firmly and lucidly established the great question involved. I will not, however, quite agree with you, if it be reversed, in bowing to superior authority. Should that calamity ensue, the bench and bar of the country . . . . .  
. . . If the Supreme Court wishes to establish the permanent peace of the country it must be by protecting *all* the people from illegal authority, and then—"Paribus se legibus ambæ invictæ gentes æterna in fœdera mittant."

Believe me, very truly and sincerely yours,

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## ADMIRALTY AND MARITIME LAW.

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## ADMIRALTY

MARITIME LAW (*continued*).

- (f.) A vessel at anchor in a fairway or roadstead of a navigable water, no anchor-lights burning, and but one anchor-watch, and he is at fault, at the time a steamer runs into her by no fault of the steamer, is solely in fault, and must bear the loss from the collision. *Baker v. The Nurnberg*, 505.

- (g.) Damages from collision by inevitable accident each party to bear his own. *Jerome v. A Floating-dock*, 508.

- (h.) Where a steamtug running free with the current and tide, down a river in a deep channel 250 yards wide, at the rate of eight miles an hour, in a fog, fails, within a distance of 30 to 60 yards, to avoid collision with another tug, having six vessels in tow, coming up the stream, at the rate of two miles an hour:

*Held*, That the tug which was running free was at fault in moving with such speed and such want of caution as to have failed to clear the approaching vessels, and that the plea of inevitable accident was inadmissible. *Ellis v. The Katy Wise*, 589.

- (i.) Damages to the person of one on board of a vessel, resulting from collision, may be recovered by libel in admiralty from the vessel in fault.

It is the duty of a steamer, in the act of backing, to keep a lookout in the stern of the vessel.

Steamers must keep out of the way of sail-vessels, whenever there is possible danger of collision. *Dunstan v. The Tug Kirkland*, 641.

## III. SALVAGE.

- (a.) A derrick-boat raised from the bottom of the channel of a public navigable river may be the subject of a libel for salvage in admiralty. *Maltby v. A Steam Derrick-boat*, 477.

and

## IV. MARITIME LIENS.

- (a.) Where a purchaser of a vessel, who takes pains before purchasing to ascertain the claims against her and to see them settled, is informed by a claimant (who is afterwards the libellant) that he has but one small claim, which is afterwards paid, and this claimant fails to inform him of the existence of a negotiable note given in payment of another claim which is receipted, and which the vendor shows as receipted to the purchaser,

*Held*, That this negotiable note is not a lien upon the vessel. *Wood v. The Tug Lumberman*, 542.

As to what may be the subject of a maritime lien see *supra* *Salvage*.

APPEARANCE. See *Judgments and Decrees*.

## ASSIGNMENTS.

1. A suit on a note secured by a deed of assignment never prosecuted to final judgment is not a waiver of the benefit of the assignment. *Clark, Dodge & Co., v. Gibboney et al.*, 391.
2. See *Trusts*.

## ATTACHMENTS.

1. Whether an attachment can issue from a court of the United States against the property of a citizen of another State, he not being in the State, at the suit of a citizen of the State. *Mauldin v. Carll*, 19.
2. See *Judgments and Decrees*.

## BANKRUPTCY.

1. A discharge in bankruptcy is only a personal release of the bankrupt from a debt, and does not release any lien of the debt upon property; and such property may be subjected by a State court to the lien when the property does not form part of the assets in bankruptcy, or by the bankruptcy court when it does, if it comes, after the discharge, again into possession of the bankrupt. *Dixon v. Barnum*, 207.

2. An assignee in bankruptcy filed a petition asking a reference to the register, with instructions to take an account of liens binding upon the bankrupt's real estate, and of their priorities, and to summon lien creditors to show cause against a sale of the real estate free of incumbrances.

Pending that petition in court, in term, and in consequence of it, the bankrupt's wife preferred her petition in court, praying a settlement out of a certain parcel of the bankrupt's real estate.

By the same order of court which granted the prayer of the assignee's petition the wife's claim for a settlement was also referred to the register, with instructions to take evidence and to make report in regard to it, as well as in regard to liens and their priorities.

Six weeks after this order of reference, to wit, on the 8th of December, 1877, the assignee and all lien creditors having been summoned before the register and been present before him, and being still before him, the register made up his report as to the liens, and as to the wife's claim for a settlement.

On the 12th of December, 1877, the register presented his report in court, in term, the assignee and lien creditors being present in person or by counsel; and the assignee then filed exceptions to the report, these exceptions relating only to that part of the register's report which treated of the bankrupt's wife's claim for a settlement.

On this state of facts, it was, on sundry exceptions,

*Held*, That although the wife could not have been required to submit her claim to the judgment of the bankruptcy court in the summary bankruptcy proceeding, yet that it was competent for her to waive her right to an adjudication on plenary proceedings, and to submit voluntarily to the adjudication of the bankruptcy court.

*Held*, That in the summary bankruptcy proceeding it was sufficient that the assignee and lien creditors had had opportunity to produce evidence and make argument before the register against the wife's claim for a settlement, and to file exceptions to the register's report; and that they had had a day in court to object to the report of the register; and that, therefore, they had no right to insist that the wife, against her wish, should be driven to a plenary proceeding in another court.

*Held*, That clause *third* of section 4972, Revised Statutes of the United States, gave full jurisdiction to the bankruptcy court over the subject-

BANKRUPTCY (*continued*).

matter of a wife's "specific claim" to a settlement out of the bankrupt's estate; and that her coming voluntarily into the bankruptcy court, by petition, to assert that claim, gave the bankruptcy court jurisdiction, personally as to herself, to "*ascertain and liquidate*" that claim.

*Held*, That where a wife's separate estate has been changed from one form of investment to another by agreement between herself and her husband, and, before the title in the property newly acquired had been made to her, the husband becomes bankrupt, the bankruptcy court, as a court of equity, in a case where its jurisdiction is clear, will treat that as done which ought to have been done, and decree a settlement upon the wife of property acquired with her separate means. *Campbell, in re*, 276.

3. Where an order of seizure was given in an involuntary bankruptcy proceeding against goods in the hands of a purchaser, by sale afterwards adjudged to have been fraudulent; and on this purchaser's petition the goods were released to him on his giving a joint and several bond to the marshal, with sureties for the forthcoming of the goods, or else to answer the future judgment of the court in the matter; and plenary proceedings were afterwards instituted in the District Court on its equity side against the purchaser and his securities on this bond to set aside the sale; and a decree was in due course rendered declaring the sale to have been fraudulent, and decreeing the value of the goods to be paid by the fraudulent purchaser and his sureties; and the purchaser (not joined by his sureties) appealed to the Circuit Court, giving an appeal bond with new sureties; and, after decree of the Circuit Court affirming the decree below, the said purchaser appealed to the Supreme Court, giving an appeal bond with still new surety and that appeal was dismissed; and then execution was taken out against the fraudulent purchaser, on which only a small part of the debt was made, leaving a large balance unpaid; and a petition was filed in the bankruptcy proceeding by the assignees against the sureties in the original delivery bond (not making the fraudulent purchaser a party) for the payment of the balance due under the decree; and the said purchaser soon after died insolvent, but leaving real estate not sufficient to satisfy by sale the amount of the decree:

*Held*, On demurrer and answer, that the assignee in bankruptcy could select which of the several bonds to proceed upon, and might proceed upon the original delivery bond, and this being joint and several, he might proceed against any one or more of the obligors without the actual motion.

*Held, also*, That the assignee might proceed by summons or petition, and need not resort to a plenary suit upon the bond.

*Held, also*, That the assignee might proceed at once against the sureties in the original bond, and need not first subject the real estate of the fraudulent purchaser of the goods replevied before so doing. *Storrs Bros. v. Engel & Son*, 414.

4. Any creditor holding a lien upon lands of the bankrupt may appeal from a decree affecting his rights to the supervisory jurisdiction of the Circuit Court.

Before lands of bankrupt covered with liens can be sold free of liens by

**BANKRUPTCY** (*continued*).

the bankruptcy court, all liens and their priorities must be definitely ascertained after personal notice to lien creditors; otherwise the lien creditor is not bound.

Where other courts have taken full jurisdiction of property on which liens are asserted, the bankruptcy courts should in general not interfere. *Taliaferro, in re*, 422.

5. The bankruptcy court has exclusive jurisdiction to liquidate the liens upon a bankrupt's real estate; but whether it will exercise this jurisdiction in any case is a matter for its own discretion, and this discretion must be exercised by the court itself, and cannot be relegated to or assumed by the register.

It is irregular to undertake to sell real estate free of incumbrances until all liens and their priorities are fully ascertained. *Addison, in re*, 430.

6. Creditors who have not proved their claims in bankruptcy until after the day fixed for showing cause against the bankrupt's discharge, cannot then make objection to the discharge upon any other ground than fraud, distinctly and specifically charged.

A creditor may consent to the bankrupt's discharge by an attorney in fact, or by his counsel, stating in open court that the consent is given; and it seems that an assent to the discharge need not be "in writing," since the enactment of section 9 of the amendatory Bankrupt Act of June 22d, 1874, amending section 5112 of the Revised Statutes. *Balmer, in re*, 637.

7. The bankrupt court has summary jurisdiction over all contracts made with itself respecting the bankrupt's property; and where, on the release of goods under seizure, bond is given for their forthcoming or their value, the District Court may, on petition or motion upon notice, order the goods or the value thereof to be brought into court by parties to the bond. *Rosenbaum v. Garnett*, 662.

8. See *Homestead Exemption*.

**BEQUESTS.**

1. A clause in a will which provided that if the testator should become a member of any of the religious communities attached to the Roman Catholic Church and should be so at the time of her death, then the previous bequests of her will were to be avoided, and a fund named in the will was to go to Richard V. Wheelan as bishop of said church, or his successor in the said dignity, in trust for the benefit of the community in which she should die a member:

*Held*, Not to be a good bequest to the "Sisters of St. Joseph" as beneficiaries, and to Bishop Kain, successor to Bishop Wheelan as trustee, for want of certainty. *Kain, Bishop, v. Gibboney et al.*, 397.

**CITIZENSHIP.**

1. There are two classes of privileges belonging to an American citizen, to wit: (a) those which he has as a citizen of the United States; and (b) those which he has as a citizen of the State where he resides as a member of society.

The Fourteenth Amendment of the United States Constitution forbids the States from abridging the privileges belonging to a person as a citizen

**HABEAS CORPUS** (*continued*).

- (c.) There be an indictment found in the State from which the prisoner has fled, or an affidavit made and certified by the governor of that State; and
  - (d.) The prisoner should have been in the State where the crime was committed and fled from it. *McKean, ex parte*, 23.
2. See *Marriage, Removal of Causes*.

**HOMESTEAD EXEMPTION.**

1. Where the State law allows the homestead exemption (with certain exceptions) against any levy by execution founded upon "any demand for any debt *contracted*" by the head of a family:
- Held*, That the exemption is good against judgments founded upon *tort*, both principal and costs.
- Held, also*, That the removal of a bankrupt out of the State after his adjudication in bankruptcy, does not defeat his right to the homestead. *Rudway, in re*, 609.

**HUSBAND AND WIFE.**

1. In a case, in which an abatement was claimed for an alleged deficiency in the sale of a tract of land, in which the husband and wife were both made parties defendant, but the wife was not a necessary party defendant:
- Held*, That the husband is a competent witness to testify *in favor* of any interest of the wife, but is incompetent to testify *against* any such interest. *Green v. Taylor et al.*, 400.
2. See *Insurance Against Fire*.

**INDICTMENTS.**

1. If an indictment founded upon section 5440 of the Revised Statutes of the United States, charges a conspiracy by two or more persons, but is an indictment of one only of such persons, it is good on demurrer. *United States v. Miller*, 553.
2. See *Evidence*.

**INJUNCTIONS.** See *Taxes*.**INSURANCE AGAINST FIRE.**

1. Where the beneficial title remains in the insured, the fact that the naked legal title outstands in another does not vitiate a policy of fire insurance requiring that the insured should be "entire, unqualified, and sole owners for their own use and benefit."
- An oath to such ownership is not falsified by the raised title being in another where the oath is made in good faith. *American Basket Co. v. Farmville Ins. Co.*, 251.
2. If a husband who has insured for himself without mention of his wife's ownership sues for damages by fire to his wife's estate, claiming an insurable interest, his declaration must set out his interest and claim damages to that interest, or he cannot recover. *Cohn v. Va. F. & M. Ins. Co.*, 272.

INSURANCE AGAINST FIRE (*continued*).

3. Where a local agent of a fire insurance company, after a fire, made out and forwarded for the insured proofs of loss not entirely in compliance with the requirements of the policy, and the company afterwards objected to paying, but on other grounds than such irregularity in the proofs of loss:

*Held*, That the company thereby waived all objections on that score.

If the insured is in apprehension of a fire at the time of taking out a policy, but states that he is not, he is not entitled to recover on his policy.

If the insured grossly exaggerates the value of his property at the time of taking out his policy he is not entitled to recover.

The burden of proof is upon the insurer to show violation of the conditions of the policy. *Whittle v. Farmville Ins. and Banking Co.*, 421.

## INSURANCE ON LIFE.

1. The failure to pay an instalment of a premium of insurance in advance when due causes a lapse of the policy, unless the agent of the company by indulgence creates the belief in the insured that he is treating the instalment as if it had been actually paid. *Winindger v. Globe Mutual Life Ins. Co.*, 257.
2. Where the amount of a policy of life insurance has been paid by the insurer, and he afterwards brings suit to recover it back, he must be deemed, by the payment, to have settled and waived all questions of law and fact as to the validity of the original contract, except fraud, which they had no means of raising when they knew the loss. *Metropolitan Life Ins. Co. v. Harper*, 260.
3. The Supreme Court of the United States, in the case of *Insurance Co. v. Statham*, 3 Otto, 24, merely declared as a principle of law that the Southern holders of Northern policies of life insurance which lapsed during the civil war by default in paying the annual premiums, were entitled to the "equitable value" of their policies as of the date of the first default in paying the premiums, and did not undertake to set out the date or prescribe the process for ascertaining that value, but left the whole subject to be determined by the jury or chancellor in each case. *Davis v. New York Life Ins. Co.*, 437.

## INTERNAL REVENUE ASSESSMENTS.

1. In a suit by the government on a distiller's bond for the amount of an assessment made by the commissioner of internal revenue under section 3182 of the Revised Statutes, it is competent for the defendant to produce evidence to show the incorrectness of the assessment, and to contradict it, although he has not first appealed to the commissioner of internal revenue against the assessment.

Where the government in such a trial fails to show by positive evidence that frauds (which might as probably or more probably have been committed at the rectifying house) were committed at the distillery, and the defendant, by all the testimony that could well be brought to establish a negative, shows that the frauds were not committed at the distillery, and

INTERNAL REVENUE ASSESSMENTS (*continued.*)

that they were probably committed at the rectifying house, and the jury refuses to find a verdict for the government merely on the presumption that the frauds were committed there, the court will refuse to grant a new trial asked for on the ground that the verdict for the defendant was against the law and evidence. *United States v. M. & E. Myers et al.*, 239.

## JUDGMENTS AND DECREES.

1. A decree in an attachment case instituted during the war by seizure of the property and publication of notice, is void as against a loyal citizen and can be impeached even collaterally.

An appearance after such a decree was rendered for the mere purpose of moving to strike the case from the docket on the ground that no process had been served, is not such an appearance as waived previous defects in the service, and cannot have the retroactive effect of validating a decree totally void. *Dorr v. Gibboney et al.*, 382.

2. See *Courts of the United States*.

JURISDICTION. See *Sovereign Powers, Courts of the United States, Equity*.

JURY. See *New Trial*.

LIEN. See *Railroad Mortgages*.

## LIMITATIONS.

1. Where a patent has been granted for 14 years and extended for 7 years, a suit may be brought against an infringer for profits that accrued at any time during the 21 years, if brought within 6 (now 5) years after the extended patent expires. *Sayles v. Richmond, Fredericksburg and Potomac R.R. Co.*, 172.

## MAILS OF THE UNITED STATES.

1. Under section 3995 of the Revised Statutes of the United States:  
*Held*, That no offence is committed unless the mail is *in transitu*, and unless the horse or vehicle is employed in carrying the mail. *United States v. McCracken*, 544.
2. The lien of a private citizen against horses for their livery cannot be enforced in a manner to stop the passage of the United States mail in a stagecoach drawn by the horses. *United States v. Barney*, 545.
3. See *Postmasters*.

## MARRIAGE.

1. Marriage, though a contract, is more than a civil contract, and is not affected by the clause of the 10th section of the 1st article of the Constitution forbidding a State from passing any laws impairing the obligation of contracts.  
A prisoner who has been prosecuted and imprisoned by his State for violating a law of his State relating to marriage, cannot be released by a United States court on *habeas corpus* on the ground that such law violates the Constitution or a law of the United States.

**MARRIAGE** (*continued*).

Section 1977 of the Revised Statutes giving to all persons the same right of making and enforcing contracts as is enjoyed by white persons only, extends to lawful contracts, and does not extend to a marriage declared void by the law of the State of the parties to the marriage, and this whether the ceremony of marriage was performed in that State or in another State, where such marriage was legal, if the parties to it go out of the State of their residence in order to evade her laws, and return to live and cohabit in the State in positive violation of her express law.

*Kinney, ex parte*, 1.

2. See *Citizenship*.

**MATERIALMEN.** See *Admiralty and Maritime Law*.

**MECHANIC'S LIEN LAW.** See *Admiralty and Maritime Law*.

**MORTGAGES.** See *Admiralty and Maritime Law*.

**NATIONAL BANKS.**

1. A national bank, upon the deposit of collateral security with it, has no power to guarantee the obligation of the person making such deposit.

A national bank may lend money on personal security, but not its credit.  
*Seligman & Co. v. Charlottesville National Bank*, 647.

2. Where a party knowingly takes as collateral security drafts of a national bank drawn for the accommodation of a customer, he cannot recover in a suit against the bank in the hands of a receiver.

A national bank has no authority to lend its credit on personal security.  
*Johnston Bros. & Co. v. Charlottesville National Bank*, 657.

**NEGOTIABLE SECURITIES.**

1. A bond of a corporation, though originally given by one citizen of the State of South Carolina to another, after the renewal agreement of May 13th, 1874, became commercial paper, and the same passed from hand to hand by delivery, and having passed into the hands of the plaintiff, a citizen of Massachusetts, he may maintain suit thereon in this court. It does not fall within the prohibition of the 11th section of the Judiciary Act of 1789. *Bradley v. Williams & Co.*, 26.

2. Negotiable promissory notes ranking as a first lien upon real estate were deposited in bank by the payees for collection on their account. As they fell due they were paid by the maker (now the bankrupt), who used funds of a loan and insurance company for the purpose, and who afterwards gave the notes to the company accompanied by writings stipulating to pay two per cent. more than the legal rate of interest which the notes had borne, and also stipulating that the company should hold the notes as a first lien upon the property on which they had been secured in the same manner as the payees of the notes had held them; all of which was without the knowledge or privity of the payees, who had collected the amount of the notes:

*Held*, That the notes were extinguished as such when paid, that the obligation of the maker of them to the company was represented by the stipu-

NEGOTIABLE SECURITIES (*continued*).

lations in writing which he had given it, and that these stipulations were new contracts of different tenor, form, and terms from the notes which had been paid, and were not first liens upon the property on which the notes had been secured in the same manner in which the notes had been. *Dooley v. F. & M. Ins. Co.*, 222.

## NEW TRIAL.

1. Where a jury, after a fair trial and full agreement, upon intelligent and competent testimony, finds a verdict which does not seem grossly excessive or plainly disregarding of the law, the court will not set such verdict aside. *Davis v. N. Y. Life Ins. Co.*, 437.
2. On motions for new trial in criminal cases, affidavits of jurors ought not to be received to impeach their own verdict. *United States v. Clements and Reid*, 509.
3. See *Internal Revenue Assessments*.

PARTIES TO FORECLOSURE SUITS. See *Railroad Mortgages*.

## PATENTS.

1. When a patent would expire on the 15th of May, and the application for an extension of it was filed on the 15th of February, preceding:  
*Held*, That the application was within ninety days, as required by law, and valid, the day of the filing being included.  
The validity of Conover's patent for a movable bed or carriage for carrying, advancing, and splitting blocks of wood, affirmed. *Johnson v. Onion et al.*, 290.
2. See *Limitations, Courts of United States, Equity*.

POSSESSION. See *Sale*.

## POSTMASTERS.

1. Postmasters have a very limited right, if they have any at all, to act as agents of citizens to open their letters and use money inclosed. *United States v. Bramham*, 557.

## RAILROAD MORTGAGES.

1. When the company defendant is in difficulty, before the appointment of a receiver, from its employes threatening a strike for the non-payment of wages due for months past, and on appeal by its officers to the petitioners, who were holders of bonds, they advanced the money necessary for the payment of the back wages due, on a distinct understanding that they should be reimbursed out of the first net earnings of the company, and that the money advanced should be paid to the employes; and afterwards, before their reimbursement, the road went into the custody of the court under the appointment of a receiver:  
*Held*, That the advances must be paid in preference to the claims of mortgagees, out of income accruing while the road was in custody of the court. *Atkins & Co. v. Petersburg R. R. Co.*, 307.
2. 1. Wages to employes past due for eight months before the order of court sequestrating the property of a railroad company and appointing re-

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RAILROAD MORTGAGES (*continued*).

- ceivers, were ordered to be paid to such employes as were retained in the employment of the road by the receivers.
2. The court refused to pay similar past due wages of employes, which had been assigned to third persons who petitioned for payment. It also refused to pay for steel rails and supplies furnished before the appointment of receivers.
  3. On petition of complainants that the receivers should be ordered to issue ten-year extension certificates to such holders of matured bonds and past due coupons as were willing to accept them, the court made the order prayed for.
  4. The complainants are trustees in a mortgage of \$5,500,000, owned almost wholly in England and Holland. These bondholders are respectively represented by a London committee and an Amsterdam committee, with whom bonds are deposited, and powers of attorney. The London committee claim to have given all bondholders notice of their intention to bring this suit, and to represent all; but the Amsterdam committee deny this, and claim to represent \$2,000,000 of bonds, and aver that the London committee represent only about \$2,000,000. It is certain that the Amsterdam committee represent a very large number of bonds, approximating the amount which they claim to represent. This agency showing powers of attorney, file a petition setting out grounds for disapproving the trustees' management of the suit, denying that the trustees represent their interests satisfactorily, and praying to be admitted as parties defendant to the suit. Their prayer was denied by the court, the opinion of the circuit judge prevailing; the district judge dissenting from this ruling of the court.
  5. The defendant in this case (the Atlantic, Mississippi, and Ohio Railroad Company) was consolidated, under an act of the Virginia Legislature, of three other companies, one of which is the Virginia and Tennessee Railroad Company. The process of consolidation authorized was that shareholders in the divisional companies were allowed to subscribe their stock to the stock of the consolidated company. So nearly all of the stock held in two of the divisional companies were stocked into that of the consolidated company, that those two companies practically went out of existence. But the case was different with the Virginia and Tennessee Company; 3389 shares in which remain outstanding. The charter of consolidation, in terms, keeps alive the company so long as this stock remains in its present status. Several mortgages executed before consolidation by this Virginia and Tennessee Company remain unsatisfied. The amount and priorities of the debts they secure were part of the subject of reference to a commissioner in this suit, and of the decrees of the court. Parties in interest prayed that this company should be made a party defendant to the suit.

The court, composed of Chief Justice Waite and Chief Justice Bond (District Judge Hughes dissenting),

*Held*, That this company was not a necessary party defendant, and denied the prayer of the petitioner.

RAILROAD MORTGAGES (*continued*).

An agreement that so-called preferred stock of a railroad company shall be a lien of a certain dignity, if brought to the knowledge of subsequent incumbrancers or their agents creates a valid equitable lien as against them, on the principle that equity considers that as done which ought to be done.

Where mortgage bonds of a railroad company past due were funded by the company into registered certificates bearing a higher rate of interest and giving additional time for the payment of the bonds, and there was no agreement, express or implied, between the company and the bondholders that the acceptance of the certificates should operate as a waiver of the lien of the bonds,

*Held*, Not to be a waiver of such lien, and not to operate as a novation.

*The Stewart Petition* (in the *A. M. & O. R.R. Case*), 354.

## RECEIVERS OF COURTS.

1. The validity of a receiver's act in selling or exchanging the property in his possession as such receiver will not be questioned in a collateral suit in another court. The court whose officer he is, having approved his accounts, discharged him, and cancelled his bond, must be assumed to have authorized as well as approved the sale. *Bradley v. Williams & Co.*, 26.

## REMOVAL OF CAUSES.

1. The mere fact that a cause is ready at a term of a State court for the *ex parte* execution of a writ of inquiry by the plaintiff after an office judgment, is not equivalent to its being ready for trial on issues joined, in the sense of section 3 of the act of March 3d, 1875, relating to the removal of causes, which requires the petition for removal to be filed at the term at which the cause could be first tried. *Hunter & Tilley v. The Royal Canadian Ins. Co.*, 234.
2. A plea to the jurisdiction and demurrer thereto having been filed in the State court, and the cause thereupon removed, under the act of 1875, before the State court had passed upon the plea :  
*Held*, That though the plea was sufficient to have defeated the action in the State court, yet, inasmuch as it set out the facts requisite to give jurisdiction to the Federal court, the latter acquired jurisdiction by removal, and was bound to treat the plea as if the suit had been originally commenced in the Federal court. *Kelly v. Va. P. Ins. Co.*, 449.
3. In order to remove a suit from a State court to a United States court, under the Judiciary Act of March 3d, 1875, the mere filing of the petition and bond in the State court by the party entitled to remove the suit is sufficient ; and the jurisdiction to determine whether or not the case was removable and was properly removed, and a sufficient bond given, is in the United States Circuit Court, and not in the State court.

The United States Circuit Court in which the copy of the record of the State court in a removed suit must be filed, and in which the party making the removal must enter his appearance, is the court held at the place in which the suit in the State court was brought, or the place of holding the United States court most convenient to that place. *Cobb v. Globe Mutual Life Ins. Co.*, 452.

REMOVAL OF CAUSES (*continued*).

4. A writ of *habeas corpus* granted by a Circuit Court of the United States commanding the sheriff of a county to bring the bodies of two colored persons before the said court, with a statement of the cause of their detention, the court proceeding on the allegation of the petition of the prisoners, that being colored persons they had been tried capitally before a State court by a jury exclusively white, in contravention of section 641 of the Revised Statutes of the United States. *Reynolds, ex parte*, 559.

## RES JUDICATA.

1. A former suit is invalid as a plea of *res judicata*, unless the record shows that the same subject-matter was involved and the same questions raised, or so involved in the main subject of controversy as to spring necessarily therefrom. *Clark, Dodge & Co. v. Gibboney et al.*, 391.

## RIPARIAN RIGHTS.

The town of Gosport was sold to private purchasers by the State of Virginia, according to a plat of lots and streets. The streets were at right-angles with the Elizabeth River, and terminated on the river. The law of Virginia gives title to riparian owners as far as low-water mark. It authorizes riparian owners to extend wharves from the land to the channel, provided navigation be not thereby obstructed. The United States became subsequent purchaser from a private owner of one of the lots of land in Gosport bordering on Elizabeth River, and built a wharf out from its own lot and from an adjoining lot to the channel. One of the streets of Gosport (which is part of the town of Portsmouth) is called Randolph Street. The lot of the United States bordered on this street from a foot or a few feet above high-water mark to low-water mark, and the government's wharf is in front of its lot and on a line with the side of Randolph Street.

The Legislature of Virginia, by special act, authorized the town of Portsmouth to lease out the space between the end of Randolph Street to the channel of Elizabeth River for the purpose of a dock, which license was exercised by the town by a lease to defendants, and a dock was made which brings deep water from the channel to the street, and extends along the side of the wharf of the United States.

This dock, being private property, is sometimes closed by its proprietors by a chain boom, and the United States is thereby sometimes prevented from using the *side* of its wharf, and confined to the use of its *front*.

A bill was filed on behalf of the United States by the District Attorney, praying for an order of injunction restraining the proprietors of the dock from obstructing the United States in the use by its vessels of the *side* of its wharf; the question being on the validity of the act of the Virginia Legislature authorizing the lease to private persons of the space occupied by the dock:

*Held*, That the State had power to authorize such a lease, that the lease was valid, and that the bill must be dismissed. *United States v. Bain et al.*, 593.

**SALE.**

1. There can be no implied warranty of the quality of goods which have been in existence and in the vendee's custody for some time before the sale, and are in his custody at the time of sale. *Dooley v. Gallagher & Co.*, 214.
2. Where a sale of goods is made on condition that the title of the vendor is not to pass until the purchase-money shall be paid, and the goods are delivered to the vendee:  
*Held*, That such a stipulation is valid, and if all taint of fraud is disproved a subsale of the goods by the vendee before payment in full to the vendor will not affect the title of the original vendor.  
The possession of goods does not of itself carry along with it the property in them, nor of itself identify the real owner of them.  
In Virginia the possession of the fixtures and outfit of a tobacco manufactory does not create the presumption that the title to them is in the person using them.  
The decision of the District Court affirming the above principles reversed by the Circuit Court on appeal on the ground that the original vendor had lost his rights by laches. *Binford, in re*, 295.
3. In land sales the words "sale in gross," when applied to the land itself are synonymous with "contract of hazard," and preclude any claim for abatement in the purchase-money. *Green v. Taylor et al.*, 400.

**SALVAGE.**

See *Admiralty and Maritime Law*.

**SOVEREIGN POWERS.**

1. As courts of justice may take cognizance of actions affecting the personal property of the government of a sovereign power whenever the service of *mesne* process before adjudication does not involve the seizure of the property out of the hands of its officers, even though the proceeding looks to a judgment, final execution on which if issued would dispossess the government; so they may take cognizance of actions concerning real property, especially in statutory ejectments, where the forms of law and the practice of the courts admit, under statutory provision, of a trial of the right or title upon a summons and appearance of the occupant of the land, where he is an officer or agent of the government, and his occupancy is not interfered with; and this is especially so when the government voluntarily intervenes to assist such officer or agent in defending its title to the land. *Lee v. Kaufman*, 36.
2. The United States government cannot be sued. *United States v. Barney*, 545.

**SUPPLIES.**

See *Admiralty and Maritime Law*.

**TAX.**

1. Though it is true that courts of equity of the United States cannot enjoin an officer of the United States from collecting a tax, yet there are circumstances under which such collecting officers may be enjoined from claim-

**TAX** (*continued*).

ing moneys of citizens and levying for them as if for taxes. *Frayser & Co. v. Russell*, 227.

2. On demurrer to a declaration on an official bond of a collector of taxes:

*Held*, That where the bond does not identify the district in which the officer is to act, nor the date of his commission, nor the sort of taxes which the officer was to collect, nor the date of the act of Congress under which the bond was given, and the condition of the bond is that the officer shall faithfully execute and discharge all the duties of "said office," in such case the declaration is demurrable and defective. *United States v. Jackson et al.*, 231.

3. See *Tender*.

**TENDER.**

1. Under the act of June 7th, 1862 amended by that of February 6th, 1863, for the collection of the direct tax in insurrectionary districts, etc., as construed in *Bennett v. Hunter*, 9 Wal. 326, and *Tacey v. Irwin*, 18 Wal. 549, a tender by friend or agent of the owner of the tax due upon property advertised for sale, is a sufficient tender; and moreover, if the tax commissioners have by an established general rule announced, and a uniform practice under it refused to receive the taxes due unless tendered by the owner in person, even a formal offer by another to pay is unnecessary. It is enough if a friend or agent of the owner went to the office of the commissioners to see after the payment of the tax on the property, but made no formal offer to pay, because it was in effect waived by the commissioners, they declining to receive any tender unless made by the owner in person. *Lee v. Kaufman*, 139.

**TITLE.** See *Sale*.

**TRADEMARKS.**

1. The right of exclusively using the word "Durham" in labels on smoking tobacco belongs to manufacturers of the article in the town of Durham, North Carolina, and

The right of exclusively using the word in connection with a picture of a Durham bull in labels on smoking tobacco belongs to W. T. Blackwell & Co., of that town.

The right to use a trademark is forfeited by non-user for a period of eight years and cannot be resumed in prejudice of one who had used it exclusively during the period of abandonment.

The assignment by one partner of all his interest in a firm to his copartner carries with it, if not expressly reserved, the right to the exclusive use of a trademark of the firm.

A trademark consisting of a word and symbol arbitrarily assumed may be lost by non-use by its owner, especially if the disuse continue as long as eight years.

If an equivalent trademark without any knowledge of the first be originated and devised by another person during such period of disuse, that other person may thereby acquire a right of exclusive use in the second trademark.

TRADEMARKS (*continued*).

If the second trademark, during such period of its abandonment, acquire a public and valuable geographical and commercial signification, so that the use of the original trademark as an arbitrary one would operate to deceive and defraud the public, a court of equity may enjoin against such use of the original one. *W. T. Blackwell & Co. v. W. T. Dibrell & Co.*, 151.

2. The exclusive right to use the trademark of a firm does not pass to any member of the firm by mere implication; but such member may use it, provided he does so in a manner not to deceive the public. *Young v. Jones, Brothers & Co.*, 274.

## TRUSTS.

1. On a deed of assignment to a trustee to secure creditors whose debts were all ascertained, and who were marshalled by the deed into four classes, a bill in chancery was brought by one of the fourth class against the trustee's executrix for a breach of trust by the trustee:

*Held*, (a.) That it was not necessary to make the other creditors parties to the suit.

(b.) That at all events it was too late to make such an objection at the hearing.

(c.) That payment of the debt by a trustee to a receiver under a decree of confiscation of a Confederate court, was a breach of trust against a loyal citizen. *Dorr v. Gibboney et al.*, 382; *Clark, Dodge & Co. v. Gibboney et al.*, 391.

## USURY.

Where a rent-charge of \$1000 per annum is purchased for \$12,500 in a State where six per cent. is the lawful rate of interest, and there is no intention or contract, direct or indirect, that it shall be considered a loan, and no provision in the deeds of assurance by which, in the event of default, the original purchase-money can be claimed, nor any law in existence on the statute-book under which, after default, the purchase-money can be recovered back:

*Held*, That the contract is not usurious but valid, binding, and to be enforced in equity. *Gordon v. Dooley*, 182.

## VARIANCE.

It is too late to take advantage of a supposed variance between the proofs and the allegations in the pleadings after the evidence is closed and the argument for the defence is begun; and in any event the variance must be material. *Dunstan v. The Tug Kirkland*, 641.

WARRANTY. See *Sale*.

*Ex. g. a. a.*

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